No. 88-1103

Supreme Court, U.S.
FILED
JAN 3 1988
JOSEPH F. SPANIOL, JR.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

STEPHEN F. WILDER, BRENDAN GILL, IMRE J. ROSENTHAL, STEPHEN ROSENTHAL, ROBERT NEUWIRTH, LORI JEAN SAIGH, and the WHITBY TENANTS' ASSOCIATION,

*Petitioners*,

v.

LEE M. THOMAS, as Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; REGION II of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; NEW YORK STATE URBAN DEVELOPMENT CORPORATION; VINCENT TESE, as Chairman of the New York State Urban Development Corporation; TIMES SQUARE REDEVELOPMENT CORPORATION; ROBERT M. HALL, as President of the Times Square Redevelopment Corporation; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; HENRY G. WILLIAMS, as Commissioner of the New York State Department of Environmental Conservation; DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK; HARVEY W. SCHULTZ, as Commissioner of the Department of Environmental Protection of the City of New York; MARIO M. CUOMO, as Governor of the State of New York; and EDWARD I. KOCH, as Mayor of the City of New York,

*Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the decision of the court of appeals departed from the collateral estoppel principles established by this Court in *Commissioner v. Sunnen*, 333 U.S. 591 (1948), and *Montana v. United States*, 440 U.S. 147 (1979), in a manner that will seriously undermine the important federal interest in uniform national standards and enforcement under the Clean Air Act and will, unnecessarily and without due respect for federal/state comity, channel environmental litigation into the federal courts.

2. Whether the court of appeals erroneously held that, in enforcement proceedings under the Clean Air Act, economic and social considerations can defeat the attainment of federal ambient air quality standards.

## PARTIES TO THE PROCEEDING

Three of the parties listed in the caption as respondents, Lee M. Thomas as Administrator of the United States Environmental Protection Agency, the United States Environmental Protection Agency and Region II of the United States Environmental Protection Agency, were not part of the proceedings below. Petitioners discontinued the action against these federal defendants and an order dismissing the action as to them was entered by the district court on July 28, 1986.

## STATEMENT PURSUANT TO RULE 28.1

The Whitby Tenants' Association is an organization of tenants and has no corporate parent.

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STEPHEN F. WILDER, BRENDAN GILL, IMRE J. ROSENTHAL, STEPHEN ROSENTHAL, ROBERT NEUWIRTH, LORI JEAN SAIGH, and the WHITBY TENANTS' ASSOCIATION,

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LEE M. THOMAS, as Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; REGION II of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; NEW YORK STATE URBAN DEVELOPMENT CORPORATION; VINCENT TESE, as Chairman of the New York State Urban Development Corporation; TIMES SQUARE REDEVELOPMENT CORPORATION; ROBERT M. HALL, as President of the Times Square Redevelopment Corporation; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; HENRY G. WILLIAMS, as Commissioner of the New York State Department of Environmental Conservation; DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK; HARVEY W. SCHULTZ, as Commissioner of the Department of Environmental Protection of the City of New York; MARIO M. CUOMO, as Governor of the State of New York; and EDWARD I. KOCH, as Mayor of the City of New York,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Stephen F. Wilder, Brendan Gill, Imre J. Rosenthal, Stephen Rosenthal, Robert Neuwirth, Lori Jean Saigh, and the Whitby Tenants' Association (hereafter collectively referred to as "petitioners") respectfully pray that a writ of certiorari issue

to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in the above-entitled proceeding.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 854 F.2d 605 and is reprinted in the Appendix at A-1. The opinion of the United States District Court for the Southern District of New York is reported at 659 F. Supp. 1500 and is reprinted in the Appendix at A-32.

## JURISDICTION

The order of the court of appeals was entered on August 10, 1988. A timely petition for rehearing was denied on September 7, 1988. *See* Appendix at A-31. A timely application for an extension of time in which to file a petition for a writ of certiorari was granted on November 28, 1988 by Justice Thurgood Marshall to and including January 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED

The statutes and regulations invoked are Sections 110 and 304 of the Clean Air Act, 42 U.S.C. §§ 7410 and 7604, which are set out in the Appendix at A-53 and A-71; Section 8-0109 of the New York State Environmental Quality Review Act, N.Y. Envtl. Conserv. Law § 8-0109 (McKinney 1984 and 1988 Supp.), which is set out in the Appendix at A-75; and Section 3.6(A) of the New York State Air Quality Implementation Plan for Control of Carbon Monoxide and Hydrocarbons in New York City Metropolitan Area which is set out in the Appendix at A-80.

## STATEMENT OF THE CASE

### A. Nature of the Action

The issues presented in this petition arise from the overlapping schemes of federal environmental regulation and state environmental review that govern the 42nd Street Development Project (the "Project"), a large state-sponsored urban renewal Project in West Midtown Manhattan. The Project is subject to the environmental impact statement requirements of the New York State Environmental Quality Review Act ("SEQRA"), N.Y. Envtl. Conserv. Law §§ 8-0101 *et seq.* (McKinney 1984 and 1988 Supp.), and to the substantive air quality mandates of the federal Clean Air Act (the "Act"), 42 U.S.C. §§ 7401 *et seq.*, enforced through the New York State Implementation Plan ("SIP").

Subsequent to approval of the Project in 1984, petitioners challenged the environmental impacts of the Project in the state courts under SEQRA and in the federal courts under the Clean Air Act. The federal courts below found petitioners' Clean Air Act claims estopped on the basis of prior adverse state court SEQRA determinations.

Petitioners are seeking certiorari because the decision below is contrary to prior decisions of this Court on the application of collateral estoppel and thwarts the important federal policy of uniformity in the administration of the Clean Air Act. It also exacerbates a conflict among the circuits on the important federal question of whether economic and social considerations are cognizable in enforcement proceedings under the Clean Air Act. Moreover, the decision below is inconsistent with established policies of the Court because litigants seeking to vindicate their rights to a safe and clean environment would be induced to bypass state court remedies and channel environmental litigation into the federal courts.

### B. Legislative and Administrative Background

The Clean Air Act was enacted in response to Congress's determination "that the growth in the amount and complexity of air

pollution brought about by urbanization, industrial development and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare . . ." 42 U.S.C. § 7401. The Act is intended "to promote and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." *Id.*

Pursuant to the Act, the Environmental Protection Agency ("EPA") has promulgated national ambient air quality standards ("NAAQS") for various air pollutants. 42 U.S.C. § 7409. In the case of carbon monoxide, these standards establish the maximum permissible eight-hour concentration of this harmful contaminant at 9 parts per million ("ppm"). 40 C.F.R. § 50.8(a)(1).

Each state must adopt comprehensive state implementation plans that set forth the strategies by which it will implement, maintain and enforce the NAAQS established by EPA. 42 U.S.C. § 7410; *see* 40 C.F.R. Part 52. Most central to this petition is the requirement in the New York SIP for carbon monoxide that, for projects in the City of New York, "the City commits to assure that mitigating measures will be implemented by the project sponsor or the City, *so as to provide for attainment of the standard by December 31, 1987 and maintenance of it thereafter.*" SIP § 3.6(A) (emphasis added) (A-82). The SIP also calls for special attention to problems arising from the rapid growth in West Midtown Manhattan and to any additional mitigating measures that may be necessary to respond to changing conditions in that area. (A-83).

As a supplement to governmental enforcement of the SIP's requirements, section 304 of the Clean Air Act provides for enforcement by means of citizen suits. 42 U.S.C. § 7604 (A-71). This citizen suit provision is an important part of the Act's remedial scheme:

> In enacting § 304 . . ., Congress made clear that citizen groups are not to be treated as nuisances or

> troublemakers but rather as welcomed participants in the vindication of environmental interests. Fearing that administrative enforcement might falter or stall, "the citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced."

*Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976) (quoting *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1975)). A citizen suit can be brought to redress violations of the Clean Air Act's standards and limitations, including provisions or requirements of SIPs. 42 U.S.C. § 7604(f)(3) (A-73).

In contrast to the mandatory air quality requirements of the Clean Air Act, which call for actual attainment of the NAAQS, the state law provisions of SEQRA contemplate a balance between social and economic goals on the one hand, and concerns about the environment on the other. The central requirement of SEQRA is the preparation of an environmental impact statement ("EIS") for any action requiring state approval that "may have a significant effect on the environment." N.Y. Envtl. Conserv. Law § 8-0109(2) (McKinney 1984) (A-75).[1] The EIS must contain a description of the proposed action, including its environmental impact and any unavoidable adverse effects, alternatives to the proposed action and mitigation measures designed

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[1] At least twenty-seven other jurisdictions have some form of environmental impact statement requirements. Besides New York, thirteen other states and Puerto Rico have comprehensive statutory requirements like SEQRA. *See* California Environmental Policy Act, CAL. PUB. RES. CODE §§ 21000-21193 (West 1986 & Supp. 1988); Connecticut Environmental Policy Act of 1973, CONN. GEN. STAT. ANN. §§ 22a-1 - 22a-27 (West 1987); Governor's Executive Order of August 21, 1974, *as supplemented by* HAW. REV. STAT. §§ 343-1 - 343-8 (1985 & Supp. 1987); IND. CODE ANN. §§ 13-1-10-1 - 13-1-10-8 (Burns 1987 & Supp. 1988); Maryland Environmental Policy Act of 1973, MD. NAT.

*(Footnote continued)*

to minimize the adverse environmental impacts. *Id.* SEQRA requires state agencies to "choose alternatives which, consistent with social, economic and other essential considerations, to the

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RES. CODE ANN. §§ 1-301 - 1-305 (1983 & Supp. 1988); Massachusetts Environmental Policy Act, MASS. GEN. LAWS ANN. ch. 30, §§ 61-62H (West 1979 & Supp. 1988); Minnesota Environmental Policy Act of 1973, MINN. STAT. ANN. §§ 116D.01 - 116D.07 (West 1987 & Supp. 1989); MONT. CODE ANN. §§ 75-1-101 - 75-1-324 (1987); North Carolina Environmental Policy Act of 1971, N.C. GEN. STAT. §§ 113A-1 - 113A-10 (1987 & Supp. 1988); South Dakota Environmental Policy Act, S.D. CODIFIED LAWS ANN. §§ 34A-9-1 - 34A-9-13 (1986 & Supp. 1988); Virginia Environmental Quality Act, VA. CODE ANN. §§ 10.1-1208 - 10.1-1212 (1985 & Supp. 1988); State Environmental Policy Act of 1971, WASH. REV. CODE ANN. §§ 43.21C.010 - 43.21C.910 (West 1983 & Supp. 1989); Wisconsin Environmental Policy Act of 1971, WIS. STAT. ANN. § 1.11 (West 1986 & Supp. 1988); Public Policy Environmental Act, P.R. LAWS ANN. tit. 12, §§ 1121-1142 (1978 & Supp. 1987). One state, Michigan, has a more comprehensive statutory scheme. *See* Michigan Environmental Protection Act of 1970, MICH. COMP. LAWS ANN. §§ 691.1201 - 691.1207 (West 1981 & Supp. 1988). Four states have promulgated extensive executive orders. *See* Michigan Executive Directive 1971-10, *as superseded by* Michigan Executive Order 1973-9, *as superseded by* Michigan Executive Order 1974-4 (May 1974); New Jersey Executive Order No. 53 (Oct. 15, 1973); Policy for the Environment (Mar. 7, 1972), *published in Environment for Tomorrow: The Texas Response, updated by The Environment Policy — Guidelines and Procedures for Processing EIS's* (Nov. 1974); State of Utah Executive Order (Aug. 27, 1974). Nine states require environmental impact assessments in certain limited contexts. *See* Game and Fish Commission Policy of July 2, 1971; Memorandum by the Arizona Game and Fish Commission, Requirements for Environmental Impact Statements (June 9, 1971); ARIZ. REV. STAT. ANN. § 30-654 (1986 & Supp. 1988); Coastal Zone Act, DEL. CODE ANN. tit. 7, §§ 7001-7003 (1974, Supp. 1980 & Interim Supp. 1981); The Tidal Wetlands Act, DEL. CODE ANN. tit. 7, §§ 6601-6620 (1983 & Supp. 1986); GA. CODE ANN. §§ 32-1-1 - 32-6-203 (1985 & Supp. 1988); KY. REV. STAT. ANN. § 278.025 (Baldwin 1987); Coastal Wetlands Protection Law, MISS. CODE ANN. §§ 49-27-1 - 49-27-69 (Supp. 1988); NEB. DEPT. OF ROADS ACTION PLAN (1973), *as revised by*, NEB. DEPT. OF ROADS, ENVIRONMENTAL ACTION PLAN (1975); NEV. REV. STAT. §§ 321.640 - 321.770 (1986 & Supp. 1987); Coastal Area Facility Review Act, N.J. STAT. ANN. §§ 13:19-1 - 13:19-21; The Wetlands Act of 1970, N.J. STAT. ANN. §§ 13:9A-1 - 13:9A-10; N.J. STAT. ANN. § 12:5-3 (West 1979 & Supp. 1988); Rhode Island Environmental Rights Act, R.I. GEN. LAWS § 10-20-1 - 10-20-11 (1985 & Supp. 1988).

maximum extent practicable, minimize or avoid adverse environmental effects." *Id.* § 8-0109(1) (A-75). Unlike the Clean Air Act, nothing in SEQRA requires the achievement of a particular level of air quality.

### C. The 42nd Street Development Project

Respondent New York State Urban Development Corporation ("UDC"), jointly with agencies of the City of New York, has planned and is preparing for the construction of the 42nd Street Development Project.[2] The Project, if built, will be accompanied by significant increases in traffic levels and carbon monoxide concentrations in the 42nd Street area.

As the Project's sponsor, the UDC recognized that the Project is an indirect source of air pollution because it will attract traffic. As required by SEQRA, the UDC prepared an EIS for the Project, which found that, absent effective mitigation measures, carbon monoxide levels in the Project area after the Project's completion would exceed the maximum lawful levels permitted by the Clean Air Act. (A-8, 108). With mitigation, carbon monoxide concentrations in the Project area would, depending on the exact location, reach as high as 9.3 ppm. *Id.* The UDC also found that, even with mitigation measures, carbon monoxide levels in excess of the NAAQS would exist during the Project's construction. (A-8, 109-110). In addition, the City's Department of Environmental Protection ("DEP"), which

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[2] The Project is a large real estate development that will fundamentally change the nature of Times Square and the surrounding areas of Manhattan by greatly intensifying commercial development. The Project involves a thirteen-acre site in Manhattan between Times Square and Eighth Avenue and from 40th to 42nd Streets. If consummated, the Project would level existing buildings in the historic Times Square area and replace them with four new office towers, providing over four million feet of office space; a new 740-room hotel with commercial and restaurant space; and a new "merchandise mart" containing 2.4 million square feet.

reviewed the Project's EIS, also found that violations of the NAAQS would persist, despite the mitigation measures, even after the Project's completion.

### D. The State Court Proceedings

Prior to the filing of the instant action, some of the petitioners herein commenced an action in the New York state courts raising procedural and substantive challenges under SEQRA to the Project's EIS,[3] including a challenge to EIS's determination of the Project's impact on traffic and air quality. *Jackson v. N.Y. State Urban Development Corp.*, 67 N.Y.2d 400, 426, 503 N.Y.S.2d 298, 311 (1986), on appeal from 110 A.D.2d 304, 494 N.Y.S.2d 700 (1st Dep't 1985).[4] The state courts upheld the UDC's actions in connection with the preparation of the EIS.

### E. The Proceedings and Decisions Below

Petitioners brought this action under the citizen suit provisions of the Clean Air Act, 42 U.S.C. § 7604 (A-71), to require respondents to carry out their duties under the SIP with respect to the planning and construction of the Project. In their Amended Complaint,[5] set out in the Appendix at A-84, petitioners

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[3] Petitioners' SEQRA claims were consolidated in the lower state court with SEQRA claims brought by other parties (the "Jackson plaintiffs") and, on appeal, with separate challenges to the Project brought under the New York Eminent Domain Procedure Law by some of the petitioners and by the Jackson plaintiffs.

[4] The state court SEQRA proceedings also raised claims that the UDC had given inadequate attention to the Project's impact on the elderly, area archeology and the City's water tunnel; had used stale data; and had modified the Project after the EIS, as well as raising certain procedural deficiencies. None of these claims is relevant to this petition.

[5] On respondents' motions to dismiss the original complaint, the trial court found that the allegations of the complaint did not sufficiently identify the provisions of the SIP on which petitioners' claims were based. The trial court

*(Footnote continued)*

allege that the traffic control measures the UDC found necessary to prevent unlawful concentrations of carbon monoxide will not be adequate to achieve compliance with the NAAQS, and that, whether or not the mitigation measures are sufficient if fully implemented, the City and State respondents have not made the commitment to implement those measures required of them by the SIP. (Claim 2; ¶¶ 36 to 42) (A-92). The Amended Complaint further alleges that the City and State respondents failed to undertake the mandated review of the Project's interactions with other development in West Midtown Manhattan. Further, respondents have not carried out their duty under the SIP to reassess continuously the adequacy of the SIP's traffic control measures, and to report annually to the EPA whether those traffic control measures are effective or in need of strengthening. (Claims 4 and 5; ¶¶ 50 to 62) (A-94).[6]

On May 13, 1987, the district court issued an opinion dismissing the action, effectively denying petitioners leave to file their Amended Complaint. In addition, the district court concluded that no further amendment of the complaint could cure the deficiencies in the petitioners' claims and therefore denied petitioners leave to file a further pleading. (A-51).

The United States Court of Appeals for the Second Circuit affirmed the judgment of the district court in an opinion by

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gave petitioners leave to submit a proposed amended complaint, but deferred decision on whether leave to amend would actually be granted until the proposed amended complaint had been prepared and reviewed. Petitioners submitted the proposed Amended Complaint on July 16, 1986.

[6] Petitioners also alleged that construction and completion of the Project will assure the continued existence of carbon monoxide "hot spots" in the Project area after the deadline set in the SIP for their elimination (Claim 1, A-90), that DEP and DEC failed to compute and report carbon monoxide emission reductions in prior years for Midtown Manhattan (Claim 3, A-93), and that DEP's and DEC's evaluation of the Project under the SIP was untimely (Claim 6, A-97). These claims were dismissed by the courts below on grounds other than collateral estoppel and are not at issue in this petition.

Judge Pratt. (A-1). The court of appeals affirmed the dismissal of the second, fourth and fifth claims solely on the ground that petitioners' claims were collaterally estopped because the adequacy of the UDC's proposed mitigation measures had been conclusively established in the New York State courts' affirmance of the UDC's determinations pursuant to the state law provisions of SEQRA.

## REASONS FOR GRANTING THE PETITION

### I. THE DECISION BELOW IS CONTRARY TO PRIOR DECISIONS OF THIS COURT ON THE APPLICATION OF COLLATERAL ESTOPPEL AND THWARTS THE IMPORTANT FEDERAL POLICY OF UNIFORMITY IN THE ADMINISTRATION OF THE CLEAN AIR ACT.

The court of appeals' holding that petitioners' second, fourth and fifth claims for relief under the Clean Air Act are preclusively barred by the prior state court SEQRA determination goes far beyond what the Court previously has recognized as the proper limits on the application of collateral estoppel. It is plain from a review of the respective federal and state regulatory schemes that the issues decided in the federal and state proceedings are not identical. If left unreviewed, the Second Circuit's decision would seriously undermine the important goal of uniformity under the Clean Air Act.

#### A. The Issues Presented in this Clean Air Act Enforcement Action Are Not Identical in All Respects to the Issues Presented in the Prior SEQRA Review.

In *Commissioner v. Sunnen*, 333 U.S. 591 (1948), the Court held that collateral estoppel "must be confined to situations where the matter raised in the second action is identical in all respects with that decided in the first proceeding and where the

controlling facts and applicable rules remained unchanged." *Id.* at 599-600. The Court emphasized that "[i]f the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation." *Id.* at 600.[7]

In *Montana v. United States*, 440 U.S. 147 (1979), the Court reaffirmed this principle in the context of a case that, like the instant action, turned on the preclusive effect of a state court adjudication in a subsequent federal adjudication. The Court made clear that collateral estoppel was appropriate only where the legal standards in the state and federal cases were identical, and the issue was "actually and necessarily determined" in the prior proceeding. *Id.* at 153.

The court below departed from these collateral estoppel principles because the issues raised in this action under the Clean Air Act differ significantly from the issues addressed by the state courts under SEQRA. In this citizen suit to enforce the SIP, the relevant question is whether the Project's mitigation measures *will* achieve and maintain the absolute air quality standard of the NAAQS as mandated by the SIP; in contrast, the relevant question in the state proceedings was whether such measures *minimized* departures from the NAAQS, consistent with various competing considerations. These are plainly different standards.

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[7] The federal courts are required by 28 U.S.C. § 1738 to give a prior state court judgment the same preclusive effect that it would have in the courts of that state under applicable state law. (A-19); *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380-81, 384 (1985); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). The standard under New York state law is the same as that established by this Court. Under New York law, ' "the issue as to which preclusion is sought [must] be identical with the issue decided in the prior proceeding;' but issues are not identical when the standards governing them are significantly different." *Cullen v. Margiotta*, 811 F.2d 698, 732 (2d Cir.), *cert. denied*, 107 S.Ct. 3266 (1987) (citing *Capital Telephone Co. v. Pattersonville Telephone Co.*, 56 N.Y.2d 11, 17-19, 451 N.Y.S.2d 11, 13-15 (1982)).

The legal provision governing petitioners' second, fourth and fifth claims in the instant action is the SIP's requirement that "the City commits to assure that mitigating measures will be implemented by the project sponsor or the City, *so as to provide for attainment of the [NAAQS]* by December 31, 1987 and maintenance of it thereafter." SIP § 3.6(A) (emphasis added) (A-82). The mitigation requirement of the SIP is absolute: any departures from the NAAQS must be eliminated without regard to any competing considerations. Thus, to comply with this requirement of the SIP, the Project's mitigation measures must be sufficient to meet the NAAQS' 9 ppm standard for carbon monoxide.

In contrast, the governing legal standard in the state proceedings did not require that the NAAQS actually be met. Indeed, SEQRA is satisfied as long as "adverse environmental effects" are minimized "consistent with social, economic, and other essential considerations, to the maximum extent practicable." N.Y. Envtl. Conserv. Law § 8-0109(1) (McKinney 1984) (A-75). Accordingly, the state administrative agency, the UDC, defined "adverse environmental effects" to be carbon monoxide concentrations *in excess of* the 9 ppm standard of the NAAQS, and found that the SEQRA requirement had been met here although the carbon monoxide concentrations at one of the Project's locations would be 9.3 ppm *even after* the implementation of the proposed mitigation measures. *See* N.Y. State Urban Development Corp., *Findings With Respect to 42nd Street Development Project, New York, New York*, Oct. 4, 1984 at 26-27 (A-108).[5]

This finding was upheld by the Appellate Division of the Supreme Court of New York, which tracked the language of SEQRA: "Our review of UDC's analysis of the traffic and air

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[5] Similarly, the UDC's finding that, for the purposes of SEQRA, the departure of 0.3 ppm is "de minimis" has no legal significance in this action. The SIP contemplates no "de minimis" exception; any mitigation measures that lead to carbon monoxide concentrations of over 9 ppm are inadequate. (A-108-109).

quality impacts assures us that UDC identified the adverse traffic and air quality impacts, took a hard analytical look at them and proposed mitigative measures which, it had a reasonable basis to conclude, would in fact *minimize those adverse effects*." *Jackson v. New York State Urban Development Corp.*, 110 A.D. 304, 310-11, 494 N.Y.S.2d 700, 704 (1st Dep't 1985) (emphasis added).[9]

The issues would be no different even if, as the court below suggested (A-25), the UDC and the state courts had found that the mitigation measures would actually eliminate, rather than merely minimize, the Project's adverse environmental effects. Under established principles, collateral estoppel can attach only to issues "actually and *necessarily* determined." *Montana v. United States*, 440 U.S. at 153 (emphasis added).[10] The only issue that was "necessarily" determined in the state proceedings was that the mitigation measures would minimize the departure from the 9 ppm standard of the NAAQS. The more stringent finding required by the federal Clean Air Act – that the 9 ppm standard actually be met – was in no way necessary to the decisions of the UDC and the state courts. Thus, as discussed above, the relevant legal question is whether findings of compliance with SEQRA can have collateral estoppel effect in a citizen suit under the Clean Air Act.

In equating the flexible standard under SEQRA with the SIP's requirement of strict compliance with the NAAQS, the Second Circuit departed from the well-established collateral estoppel

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[9] In its affirmance, the New York Court of Appeals merely quoted the Appellate Division's conclusion. *See Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400, 426, 503 N.Y.S.2d 298, 311 (1986).

[10] See *Schwartz v. Public Adm'r of Bronx*, 24 N.Y.2d 65, 71, 298 N.Y.S.2d 955, 960 (1969) ("[t]here must be an identity of issue which has necessarily been decided in the prior action"); *Kleinberger v. Town of Sharon*, 116 A.D.2d 367, 369, 501 N.Y.S.2d 746, 747 (3d Dep't 1986) (citing *Silberstein v. Silberstein*, 218 N.Y. 525, 528 (1916)) ("a judgment does not work an estoppel as to unessential facts, even though put in issue by the pleadings and directly decided").

principles fashioned by the Court. As indicated below, this decision, if it remains uncorrected, will have serious negative effects on the administration of the Clean Air Act.

**B. The Second Circuit's Preclusion of Clean Air Act Enforcement Because of a State Court SEQRA Review Thwarts the Important Federal Policy of Uniform National Standards Embodied in the Act.**

By holding that findings pursuant to the standard of SEQRA would have collateral estoppel effect in a citizen suit under the Clean Air Act, the Second Circuit thwarted the important federal goal of uniform administration of the Act.

Congress recognized in 1970 when it enacted the requirement of uniform federal air quality standards (to be achieved through the promulgation of NAAQS and state implementation plans designed to achieve these NAAQS) that "the basic strategies in the Nation's war against air pollution must be developed in a unified and consistent way by the Federal Government." H.R. Rep. No. 1146, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 5356, 5371. It reemphasized this goal at the time of the 1977 amendments to the Act:

> Without national guidelines . . . a State deciding to protect its clean air resources will face a double threat. The prospect is very real that such a State would lose existing industrial plants to more permissive States. But additionally the State will likely become the target of "economic-environmental blackmail" from new industrial plants that will play one State off against another with threats to locate in whichever State adopts the most permissive pollution controls. In other words, without national guidance on prevention of significant deterioration, the very States demonstrating a concern for preserving existing clean air seriously risk having their economic base undermined.

H. Rep. No. 294, 95th Cong., 1st Sess. 134 (1977), *reprinted in* 1977 U.S. Code Cong. & Admin. News 1077, 1213. *See also Duquesne Light Co. v. EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983).

The decision below creates several areas of nonuniformity in the national administration of the Clean Air Act. First, like New York, many states have environmental review requirements. *See supra* note 1. If, in each of these states, the *federal standard* under the Clean Air Act is determined by reference to the applicable *state standard* whenever there has been a prior adjudication in state court, the Clean Air Act will, effectively, prescribe a multiplicity of different air quality levels. Second, because the state environmental review provisions, like SEQRA, do not apply to all projects, *see* N.Y. Envtl. Conserv. Law §§ 8-0109(2), 8-0111(5) (McKinney 1984 and 1988 Supp.), attainment of the Clean Air Act's standards will depend on what kind of project causes the pollution. Third, because a litigant may decide to forego its state remedies, *see infra* at 22-25, the required national air quality may also depend on whether a challenge is brought initially in state rather than federal court. For these reasons, the decision below according collateral estoppel effect to a determination under SEQRA will severely hamper the uniformity goals that Congress identified as central to the Clean Air Act. *See* Gold, *Clean Water, Federalism and the Res Judicata Impact of State Judgments in Federal Environmental Litigation*, 16 U.C. Davis L. Rev. 1, 18-20 (1982).

### C. Additional Reasons Support the Grant of Certiorari to Review the Collateral Estoppel Determinations of the Court Below.

Two additional reasons support the grant of certiorari to review the collateral estoppel determinations of the court below. First, the Second Circuit's decision is inconsistent with *Kremer v. Chemical Contruction Corp.*, 456 U.S. 461 (1982). In *Kremer*, the Court gave collateral estoppel effect to a state agency administrative adjudication upheld upon state court review because the agency proceedings had provided a full and fair opportunity

to litigate the precluded issues. *Id.* at 480-485. But, here, unlike *Kremer*, there was no full and fair opportunity to litigate the issues before either the administrative agency or the state courts. The UDC was not acting in a judicial capacity, *cf. University of Tennessee v. Elliot*, 478 U.S. 788, 797 (1986)(principles of issue preclusion applicable "to the factfinding of administrative bodies acting in a judicial capacity"); *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1986), when it held its legislative-type hearing and published its determinations and findings. Neither petitioners nor anybody else had an opportunity to present witnesses or evidence in a trial-type setting or to rebut the myriad of factual assertions underlying the UDC's environmental analysis. Nor was there any adjudicatory factfinding by the reviewing courts. Rather, the state courts were limited to a review of the agency's record and could set aside the agency's determination "only if arbitrary, capricious, or unsupported by substantial evidence." *Jackson*, 67 N.Y.2d at 417, 503 N.Y.S.2d at 305. Thus, the factor that was central to the collateral estoppel determination in *Kremer*—that opposing parties have an adequate opportunity to litigate disputed issues of fact—was simply not present here. *Kremer*, 456 U.S. at 480-85 (complaintant had an opportunity "to rebut evidence submitted or obtained from the respondent"). *See also Montana v. United States*, 440 U.S. at 153-54; *Allen v. McCurry*, 449 U.S. 90, 95 (1980).

Second, the court of appeals' application of collateral estoppel to bar petitioners' second, fourth, and fifth claims for relief extended to questions and facts never considered in the prior proceedings. For example, in their second claim, petitioners challenged not only the adequacy of the mitigation measures that were approved by the UDC, but also the subsequent efforts by the City of New York to assure the implementation of such mitigation. (A-92-93). The state courts did not determine (and because the issues arose after the administrative determination, could not have determined) whether the City and State

environmental agencies failed to carry out their commitment to mitigation.[11]

In summary, certiorari should be granted because the court below departed from well-established collateral estoppel principles in a manner that will seriously undermine the important uniformity requirement of the Clean Air Act.

## II. THE COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS ON THE IMPORTANT FEDERAL QUESTION OF WHETHER ECONOMIC AND SOCIAL CONSIDERATIONS ARE COGNIZABLE IN ENFORCEMENT PROCEEDINGS UNDER THE CLEAN AIR ACT.

Certiorari should also be granted because the decision below is in conflict with decisions of other circuits on whether economic and social considerations are cognizable in enforcement proceedings under the Clean Air Act. In *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), the Court unanimously held that "claims of economic and technological infeasibility [are] to be wholly foreign to the Administrator's consideration of a state implementation plan." *Id.* at 256. It stated that the Clean Air Act's

> deadline for achieving primary air quality standards is central to the Amendments' regulatory scheme and, as both the language and the legislative history of the requirement make clear, it leaves no room for claims of technological or economic infeasibility.

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[11] Petitioners' fourth and fifth claims also raise issues distinct from the adequacy of the Project's mitigation measures. The fourth claim alleges that respondents breached their duties under Section 3.6 of the SIP by "(1) not requiring the production of materials in the EIS that were necessary in order to give special attention to the midtown area in the annual report; (2) not giving special attention to significant changes in the midtown area (*i.e.*, the interaction between the project, the Javits Center, and the changing traffic flow patterns generated by the center); and (3) failing to describe these significant changes 'realistically' in the annual report." (A-12, 94-96). Similarly, the

*(Footnote continued)*

*Id.* at 258. *See generally Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 64-65 (1975). The Court reviewed the legislative history of the Act and concluded that Congress had mandated a policy of "technology-forcing":

> "In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air quality standards. The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to public health.
>
> "Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down. . . ."

*Union Electric*, 427 U.S. at 259-60 (quoting S. Rep. No. 1196, 91st Cong., 2d Sess. 2-3 (1970)); *see also id.* at 269.

While the Court unambiguously held that economic and technological infeasibility may not be considered by the Administrator in reviewing a SIP, the question of whether a violator may, in certain circumstances, raise a defense of economic or technological infeasibility in a civil or criminal enforcement proceeding was explicitly left open.[12] *Id.* at 268 n.18. Even though

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fifth claim alleges respondents' failure to fulfill the SIP requirements that special attention be given annually to any mitigating measures that might be necessary in response to significant changes in the West Midtown area. (A-96-97). A preclusive finding that the Project's mitigation measures were adequate to mitigate the Project's adverse effects cannot be issue determinative of the broader and continuing concerns raised in these claims for relief.

[12] The Court did review certain circumstances in which the Act permitted technological feasibility to be considered. 427 U.S. at 266-68. None of these situations is applicable to the instant action.

*Union Electric* appears to "totally undermine" the rationale for allowing considerations of technological or economic infeasibility as a defense to enforcement of a SIP, *Friends of the Earth v. Potomac Electric Power Co.*, 419 F. Supp. 528, 535 (D.D.C. 1976), there is a split in the circuits as to whether, and to what extent, infeasibility may be considered in an enforcement action. Indeed, the courts of appeals have fashioned flatly inconsistent rules to govern this issue.

In collaterally estopping petitioners, the Second Circuit applied the SEQRA standard to an enforcement action under the Clean Air Act. As already indicated, agency actions are lawful under SEQRA if they merely minimize or avoid adverse environmental effects to the maximum extent practicable consistent with social, economic and other essential considerations. N.Y. Envtl. Conserv. Law § 8-0109(1) (McKinney 1984). Thus, in applying the SEQRA standard to petitioners' Clean Air Act claims, the Second Circuit determined that, in enforcement proceedings,[13] the attainment of the NAAQS can be compromised by "social, economic, and other essential considerations."

Like the Second Circuit, the Seventh Circuit, in *Bethlehem Steel Corp. v. EPA*, 638 F.2d 994 (7th Cir. 1980), refused to extend *Union Electric*'s absolute requirement of compliance with the NAAQS to enforcement actions. The Seventh Circuit held that:

> [B]ecause these procedures may result in the state's requiring technological innovations that are infeasible or 'border on the impossible,' . . . the source may raise

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[13] It is of no moment that this enforcement action was brought by private citizens rather than by the EPA. Private enforcement of the Act is intended to complement EPA's regulatory role and DEC's role in implementing the measures incorporated in the EPA-approved SIP. *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976). Once the notice provisions of Section 304(b) of the Act, 42 U.S.C. § 7604(b) (A-71), are met, the private citizens stand in the EPA's shoes to assure enforcement of the Act.

> its infeasibility defense in the course of enforcement proceedings. This is true whether the proceedings are brought in the state courts by the state, or in a federal enforcement action under § 113.

*Id.* at 1005 (citations omitted).

In sharp contrast to the decisions of the Second and Seventh Circuits, the Third and Sixth Circuits extended *Union Electric*'s rule to enforcement actions.[14] In *United States v. Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077 (3d Cir. 1987), EPA sought to enforce an amended consent decree which required Wheeling to install pollution control equipment at a West Virginia plant in order to achieve compliance with the West Virginia SIP. *Id.* at 1079, 1081-82. To justify its failure to comply with the decree, Wheeling argued that the compliance was economically infeasible and made plant closure a distinct possibility because 1985 losses exceeded $300,000,000 and because it had experienced a 98-day labor strike. *Id.* at 1086-87. The Third Circuit explicitly relied on *Union Electric* to hold that "economic infeasibility is not a proper basis for staying compliance with the Clean Air Act." *Id.* at 1087.

Likewise, the Sixth Circuit, in *United States v. Ford Motor Co.*, 814 F.2d 1099 (6th Cir.), *cert. denied*, 108 S. Ct. 83 (1987), refused to permit consideration of technological and economic infeasibility in an enforcement action. In that case, the United States sought to enforce the Michigan SIP, which, according to Ford, had been vacated by a consent order entered in a state court action brought by Ford to enjoin enforcement of the SIP by the Michigan environmental agencies. *Id.* at 1101. Ford argued that refusing to give effect to the state court judgment would violate its Fifth Amendment right to due process

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[14] A number of federal district courts have also followed this course. *See, e.g., United States v. SCM Corp.*, 667 F. Supp. 1110, 1126-27 (D. Md. 1987); *Friends of the Earth v. Potomac Electric Power Co.*, 419 F. Supp. 528, 535 (D.D.C. 1976) (citizen suit under 42 U.S.C. § 7604 to enforce a SIP provision).

because the state court was the only forum available for challenging the technological and economic feasibility of the Michigan SIP. *Id.* at 1103. Rejecting Ford's argument, the Sixth Circuit held that "the Clean Air Act envisions situations where standards currently economically or technologically infeasible will nonetheless be enforced." *Id.* (citing *Union Electric*, 427 U.S. at 258-59).[15]

Thus, the Second Circuit's preclusion of federal Clean Air Act enforcement on the basis of a state determination that balanced the goal of attainment of the NAAQS against social and economic concerns, like the Seventh Circuit's decision in *Bethlehem Steel*, is in direct conflict with decisions by the Third and Sixth Circuits extending *Union Electric* to enforcement actions.

The Court has recognized the "primary congressional purpose of prompt attainment of the national ambient air quality standards." *Union Electric*, 427 U.S. at 266. In addition, Congress has stressed the importance of uniformity in the enforcement of the Clean Air Act. *See supra* at 14-15. The Court should grant certiorari to resolve the conflict among the circuits and determine whether attainment of the NAAQS can be compromised, in enforcement proceedings, by competing considerations.

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[15] The Sixth Circuit noted that "technical infeasibility coupled with good faith efforts can be considered by the district court as a factor mitigating against the imposition of monetary penalties in the enforcement action," *Ford Motor Co.*, 814 F.2d at 1104, but not as a defense to the enforcement action.

## III. THE DECISION BELOW IS INCONSISTENT WITH ESTABLISHED POLICIES OF THIS COURT BECAUSE LITIGANTS SEEKING TO VINDICATE THEIR RIGHTS TO A SAFE AND CLEAN ENVIRONMENT WOULD BE INDUCED TO BYPASS STATE COURT REMEDIES AND CHANNEL ENVIRONMENTAL LITIGATION INTO THE FEDERAL COURTS.

The decision of the court of appeals below that litigants who obtain state court judicial review under SEQRA are collaterally estopped from pursuing their federal causes of action under the Clean Air Act will, unnecessarily and without due respect for federal/state comity, channel environmental litigation into the federal courts. The decision therefore undermines the Court's longstanding policy that federal remedies should supplement, rather than supplant, available state remedies. *See, e.g., New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 65 (1980); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-50 (1974).

A citizen suit under the Clean Air Act and a state SEQRA action cannot be brought together, either in federal or state court. Under the guidelines in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981), federal courts have exclusive jurisdiction over citizen suits under the Act because there is both an "unmistakable implication from legislative history," and a "clear incompatibility between state-court jurisdiction and federal interests" in enforcing the Clean Air Act.[16] *Id.* at 478.

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[16] The Clean Air Act and its legislative history "unmistakably impl[y]" exclusive federal jurisdiction. The citizen suit provision provides that suit "may be brought *only* in the judicial district" where the source of pollution is located. 42 U.S.C. § 7604(c)(1) (emphasis added) (A-72). It also provides that the "court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure." 42 U.S.C. § 7604(d) (A-72). Congress could not have intended to lay down federal rules for venue and security for the *state* courts, possibly in conflict with state rules.

(*Footnote continued*)

Similarly, the federal courts cannot hear SEQRA claims because the defendants in such claims are state agencies, and the Court has held that federal district courts are barred by the Eleventh Amendment from exercising pendent jurisdiction over claims that state officials violated state law in carrying out their official responsibilities. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 121 (1984).

Thus, the collateral estoppel decision of the court below, if undisturbed, would leave environmental litigants a choice of pursuing their state environmental review claims in state court and giving up their Clean Air Act causes of action, or foregoing the procedural safeguards of their state statutes in order to bring an action under the Clean Air Act.[17] Because of the differences between the federal and state schemes, litigants are likely to proceed in federal court. First, the inquiry under SEQRA is limited to whether adverse environmental effects – defined in petitioners' action as departures from the standards set by

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The citizen suit provision also provides for suit against the Administrator for failure to perform any non-discretionary act or duty, 42 U.S.C. § 7604(a)(2) (A-71), and against federal agencies and the United States for violation of an emission standard or limitation, 42 U.S.C. § 7604(a)(1) (A-71). It is highly unlikely that Congress intended either to give state courts jurisdiction over a federal officer or to split the citizen suits provision into two parts, one of which would permit state court jurisdiction over citizen suits against private polluters, while the other part allows only federal jurisdiction over federal officers.

Moreover, the legislative history of the citizen suit provisions refers only to federal jurisdiction: "Prior to commencing any action in the district courts, the plaintiff must have provided the violator, the Administrator and the State with sixty days notice." Conf. Rep. No. 1783, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5374, 5388.

[17] The short statute of limitations of SEQRA in New York (and of similar statutes in other states) does not make it possible for a litigant to pursue state remedies in state court following an *adjudication* of the Clean Air Act claims in federal court. *See infra* at note 18.

the NAAQS – are minimized "consistent with social, economic and other essential considerations." N.Y. Envtl Conserv. Law § 8-0109(1) (McKinney 1984) (A-75). In contrast, by bringing a citizen suit under the Clean Air Act, a litigant can enforce the mandates of the SIP, which is designed to achieve actual compliance with the NAAQS. Second, it would be a rare litigant that would forego the benefits of a full evidentiary hearing in federal court under the Clean Air Act with the procedural protections of the Federal Rules of Civil Procedure for a deferential review of the administrative record in state court under a state environmental quality review act. *See supra* at 16.

As a consequence, environmental plaintiffs will be encouraged to forego an appeal to the state courts from state administrative determinations, and to proceed instead directly to federal court. As Justice Blackmun has stated: "It is a perverse sort of comity that eliminates the reviewing function of state courts in the name of giving their decisions due respect." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 504-05 (1982) (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting).

Finally, the problems caused by the decision below would not be cured even if it were possible to bring in a single forum both a citizen suit under the Clean Air Act and an action under a state environmental review scheme like SEQRA. The Clean Air Act provides that no action may be commenced under the citizen suits provisions "prior to 60 days after the plaintiff has given notice of the violation to" the EPA, the State and the alleged violators. 42 U.S.C. §7604(b)(1)(A)(A-71). However, at least eighteen of the jurisdictions that have SEQRA-like environmental quality review acts or executive orders require that challenges be brought in less than sixty days.[18] Even in New York, where

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[18] *See, e.g.*, CONN. GEN. STAT. ANN § 4-193 (West 1987) (45 days); DEL. CODE ANN. tit. 7, § 7008 (1983 & Supp. 1986) (20 days); GA. CODE ANN. § 31-5-3(a)(3) (1985 & Supp. 1988) (30 days); HAW. REV. STAT. § 91-14(b)

*(Footnote continued)*

the statute of limitations to bring a SEQRA action is four months, N.Y. Civ. Prac. L. & R. 217 (McKinney 1987), the action would have to be brought very soon after the expiration of the sixty-day notice period. But a central purpose of the Act's notice provision is to allow a perceived violation to be remedied without the need for resort to legal process. *Natural Resources Defense Council v. Train*, 510 F.2d 692, 703 (D.C. Cir. 1975); *Friends of the Earth v. Potomac Elec. Power Co.*, 546 F. Supp. 1357, 1361 (D.D.C. 1982). This conflict-resolving purpose would clearly be vitiated by the requirement that an action be brought so promptly after the notice of violation.

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(1985 & Supp. 1987) (30 days); IND. CODE ANN. § 4-21.5-5-5 (Burns 1987 & Supp. 1988) (30 days); MD. RULES, Vol. 2, B4a. (1988) (30 days); Massachusetts Environmental Policy Act of 1973, MASS. GEN. LAWS ANN. ch. 30, § 62H (West 1979 & Supp. 1988) (30 days); MICH. COMP. LAWS ANN. § 24.304 (West 1981 & Supp. 1988) (60 days); Minnesota Environmental Policy Act of 1973, MINN. STAT. ANN. § 116D.04 (West 1987 & Supp. 1989) (30 days); Coastal Wetlands Protection Law, MISS. CODE ANN. § 49-27-39(a) (Supp. 1988) (30 days); MONT. CODE ANN. § 2-4-702(2)(a) (1987) (30 days); NEV. REV. STAT. § 233B.130.2 (1986 & Supp. 1987) (30 days); N.C. GEN. STAT. § 150B-45 (1987 & Supp. 1988) (30 days); R.I. GEN. LAWS § 42-35-15(b) (1985 & Supp. 1988) (30 days); S.D. CODIFIED LAWS ANN. § 1-26-31 (1986 & Supp. 1988) (30 days); Rules of Supreme Court, VA. CODE, Rule 2A:2 (1988) (30 days); State Environmental Policy Act of 1971, WASH. REV. CODE ANN. § 43.21C.080 (1983 & Supp. 1989) (30 days); WIS. STAT. ANN. § 227.52 (West 1986 & Supp. 1988) (30 days).

## CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the judgment of the court of appeals.

Respectfully submitted,

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Dated: January 3, 1989

# APPENDIX

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Stephen F. WILDER, Brendan Gill, Imre J. Rosenthal, Stephen Rosenthal, Robert Neuwirth, Lori Jean Saigh, and the Whitby Tenants' Association, Plaintiffs-Appellants,

v.

Lee M. THOMAS, as Administrator of the United States Environmental Protection Agency, United States Environmental Protection Agency; Region II of the United States Environmental Protection Agency; New York State Urban Development Corporation; Vincent Tese, as Chairman of the New York State Urban Development Corporation; Times Square Redevelopment Corporation; Carl Weisbrod, as President of the Times Square Redevelopment Corporation; New York State Department of Environmental Conservation; Henry G. Williams, as Commissioner of the New York State Department of Environmental Conservation; Department of Environmental Protection of the City of New York; Harvey W. Schultz, as Commissioner of the Department of Environmental Protection to the City of New York; Mario M. Cuomo, as Governor of the State of New York; and Edward I. Koch, as Mayor of the City of New York, Defendants-Appellees.

No. 288, Docket 87-7516.

United States Court of Appeals,
Second Circuit.

Argued Dec. 7, 1987.

Decided Aug. 10, 1988.

Before FEINBERG, Chief Judge,
OAKES, and PRATT, Circuit Judges.

GEORGE C. PRATT, Circuit Judge:

This appeal arises from the most recent in a long series of actions that have been brought in state and federal courts by these plaintiffs and others similarly situated, who seek to forestall construction of the proposed 42nd Street Development Project ("the

project") in New York City. The facts surrounding the impetus for the project and the complex procedural machinations that have accompanied the planning stages are described in *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 503 N.Y.S.2d 298, 494 N.E.2d 429 (1986), *aff'g* 110 A.D.2d 304, 494 N.Y.S.2d 700 (1st Dep't 1985). The goal of the project is to eliminate "physical, social and economic blight" in the Times Square area, *Rosenthal & Rosenthal, Inc. v. N.Y. State Urban Dev. Corp.*, 771 F.2d 44, 45 (2d Cir.1985) (citing *Natural Resources Defense Council, Inc. v. City of New York*, 672 F.2d 292, 294 (2d Cir.), *cert. dismissed*, 456 U.S. 920, 102 S.Ct. 1963, 72 L.Ed.2d 462 (1982)), *cert. denied*, 475 U.S. 1018, 106 S.Ct. 1204, 89 L.Ed.2d 317 (1986). After extensive study and review pursuant to state statute, the City of New York, the New York State Urban Development Corporation ("UDC"), its subsidiary, the Times Square Redevelopment Corporation, and various private developers have decided that this goal will be achieved by the construction of four office towers, a hotel, eight renovated theatres, a wholesale mart, restaurants, retail spaces, and a renovated subway station. *See Jackson*, 503 N.Y.S.2d at 302-03, 494 N.E.2d at 433-34. The project area has been divided into twelve sites between 40th and 43rd streets.

Opposition to the project by area business owners and residents, historical preservationists, and environmentalists has so far produced more than two dozen actions against the project. Residents fear that they will be driven out by skyrocketing property values; environmentalists claim that the project will exacerbate traffic congestion, thereby increasing levels of air pollution; others seek to preserve landmark theatres from demolition. There have already been unsuccessful challenges under the antitrust laws, *Cine. 42nd St. Theatre Corp. v. Nederlander Org.*, 609 F.Supp. 113 (S.D.N.Y.1985), *aff'd*, 790 F.2d 1032 (2d Cir.1986); on first amendment, due process and equal protection grounds, *G & A Books v. Stern*, 604 F.Supp. 898 (S.D.N.Y.), *aff'd*, 770 F.2d 288 (2d Cir.1985), *cert. denied*, 475 U.S. 1015, 106 S.Ct. 1195, 89 L.Ed.2d 310 (1986); as an allegedly unconstitutional exercise of the eminent domain power, *Rosenthal & Rosenthal, Inc. v. N.Y. State Urban Dev. Corp.*, 605 F.Supp. 612

(S.D.N.Y.), *aff'd*, 771 F.2d 44 (2nd Cir.1985); and under New York City's Uniform Land Use Review Procedure, *Rosenthal & Rosenthal, Inc. v. New York City Bd. of Estimate*, 114 A.D.2d 1054, 495 N.Y.S.2d 549, *aff'd*, 67 N.Y.2d 349, 502 N.Y.S.2d 707, 493 N.E.2d 931 (1986).

In addition to filing two of the aforementioned suits, the plaintiffs in this case (except Brendon Gill and the Whitby Tenants' Association) also brought a proceeding under Article 78 of New York's C.P.L.R. There they challenged UDC's compliance with the State Environmental Quality Review Act ("SEQRA") in analyzing the environmental impact of the proposed project. *See Rosenthal v. New York State Urban Dev. Corp.*, 110 A.D.2d 304, 494 N.Y.S.2d 700 (1st Dep't 1985), *aff'd*, 67 N.Y.2d 400, 503 N.Y.S.2d 298, 494 N.E.2d 429 (1986) (consolidated with *Jackson v. New York State Urban Dev. Corp.*). They focus particularly on perceived problems with levels of carbon monoxide in the Times Square area.

Plaintiffs discontinued the action against three federal defendants who were named in the original complaint in this case. An order dismissing the action as to those defendants was entered on July 28, 1986.

Plaintiffs appeal from a judgment of the United States District Court for the Southern District of New York, Thomas P. Greisa, *Judge*, that dismissed their action brought under the citizen suits provision of the Clean Air Act ("CAA"), 42 U.S.C. § 7401 et seq., on the ground that the proposed amended complaint failed to state a claim. Plaintiffs alleged that defendants violated requirements of the CAA relating to transportation control measures set out in New York State's implementation plan, which was adopted pursuant to CAA § 7410. In essence, plaintiffs claim that construction of the project will lead to further violations of the CAA, and they seek an injunction against construction of the project.

## I. BACKGROUND

Plaintiffs rely in particular on § 7604(a) which provides, in pertinent part, that "any person may commence a civil action on his own behalf * * * against any person * * * [or] governmental instrumentality or agency * * * who is alleged to be in violation of * * * an emission standard or limitation under this chapter". 42 U.S.C. § 7604(a)(1)(A). "Emission standard or limitation" is defined as including "any condition or requirement under an applicable implementation plan relating to transportation control measures", § 7604(f)(3). A citizen may also commence a civil action against the administrator of the Environmental Protection Agency ("EPA") where the administrator fails to perform any non-discretionary duty under the CAA. § 7604(a)(2).

A. *Statutory Schemes.*

Because implementation of the act involves a complex interplay of state and federal responsibilities, *see Concerned Citizens of Bridesburg v. Envtl. Protection Agency*, 836 F.2d 777, 779 (3d cir.1987); *Connecticut v. Envtl. Protection Agency*, 696 F.2d 147, 151 (2d Cir.1982); *Council of Commuter Orgs. v. Gorsuch*, 683 F.2d 648, 651 (2d Cir.1982), it is necessary to examine the procedural requirements of both the state and federal statutory environmental protection schemes and the extent to which the defendants have, insofar as the planning of the project is concerned, complied with these requirements.

SEQRA, enacted in 1975 and codified as N.Y. Envtl. Conserv. Law § 8-0101 et seq. (McKinney 1984), was designed, in part, to fill a gap left by the National Environmental Policy Act, 42 U.S.C. §§ 4321, 4332 et seq., which imposed an obligation on federal agencies to consider the environmental consequences of federally funded or approved projects. A key provision in SEQRA is the requirement that state and local agencies prepare an environmental impact statement ("EIS") on any action they propose or approve that "may have a significant effect on the environment." N.Y. Envtl. Conserv. Law § 8-0109.2 *See* 503

N.Y.S.2d at 303-04, 494 N.E.2d at 434-35. The purpose of the EIS "is to provide detailed information about the effect which a proposed action is likely to have on the environment, to list the ways in which any adverse effects of such an action might be minimized, and to suggest alternatives to such an action so as to form the basis for a decision whether or not to undertake or approve such action." N.Y. Envtl. Conserv. Law § 8-0109.2.

The CAA was designed to prevent and control air pollution by providing "Federal financial assistance and leadership * * * for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution." 42 U.S.C. § 7401(a)(3), (4). The CAA amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1679 (1970), *amended by* Pub. L. 95-95, Title I, § 106, 91 Stat. 691 (1977), required the EPA to promulgate national ambient air quality standards ("NAAQS") for various air pollutants, including carbon monoxide. *See* § 7409 (National Primary and Secondary Air Quality Standards); 40 C.F.R. § 50.8 (1987); *Council of Commuter Orgs. v. Gorsuch*, 683 F.2d at 651. The NAAQS for carbon monoxide is "9 parts per million * * * for an 8-hour average concentration not to be exceeded more than once per year." 40 C.F.R. § 50.8(a)(1) (1987).

Section 7410(a)(1) requires that each state adopt an implementation plan ("SIP") that provides for the "implementation, maintenance, and enforcement of national primary and secondary ambient air quality standards". *See Concerned Citizens of Bridesburg*, 836 F.2d at 780-81; *see generally* 683 F.2d at 651 (discussing SIP revision process for nonattainment areas). The administrator is required to approve or disapprove a proposed SIP within four months after it is submitted, based on criteria set out in § 7410(a)(2). Thus, the EPA "determines the ends — the standards of air quality — while the states are given the initiative and broad responsibility to achieve those ends." *Concerned Citizens of Bridesburg*, 836 F.2d at 779 (citation omitted).

The 1977 amendments to the CAA extended the deadline for attainment of carbon monoxide and ozone standards in certain "nonattainment states", including New York. *See* 42 U.S.C.

§ 7502(a)(2); 683 F.2d at 651. Pursuant to these amendments, "extension states" were required to submit SIP revisions containing measures stringent enough to assure attainment of the NAAQS by December 31, 1987. *See* § 7502(c); 683 F.2d at 651. The December 31, 1987, federal statutory deadline was in effect when the complaint leading to this appeal was filed.

In a continuing appropriations bill, Joint Resolution 395, Pub. L. No. 100-202 (Jan. 6, 1987), congress approved legislation that prohibits the EPA from imposing, prior to August 31, 1988, sanctions on areas that fail to attain the NAAQS for carbon monoxide by December 31, 1987. *See generally* 42 U.S.C. § 7413 (Federal enforcement procedures); *Council of Commuter Orgs. v. Gorsuch*, 683 F.2d at 651 (discussing treatment of "nonattainment areas" under Clean Air Act amendments of 1977). Although this amendment, in effect, extends the deadline for attainment of the NAAQS in New York City to August 31, 1988, the SIP that was in effect when plaintiffs brought this suit has not been modified and still contains a commitment that "all [carbon monoxide] hot spots will be eliminated by the end of 1987." New York State Air Quality Implementation Plan for Control of Carbon Monoxide and Hydrocarbons in New York City Metropolitan Area § 3.5.3, at 3-21 (Future Action) (revised January 1984). A "hot spot" is "any location which has been shown to have a potential to violate [the NAAQS] for carbon monoxide as of December, 1982." *Id.* at § 3.3.

The provisions of the SIP are crucial to this appeal because plaintiffs bringing a citizen suit "must allege a violation of a specific strategy or commitment in the SIP and describe, with some particularity, the respects in which compliance with the provision is deficient." *Council of Commuter Orgs. v. Metro. Transp. Authority*, 683 F.2d 663, 670 (2d Cir.1982). *See Action for Rational Transit v. Westside Highway*, 699 F.2d 614, 616 (2d Cir.1983).

The 1984 SIP was submitted pursuant to that portion of § 7410 that allows states to include provisions for review of "indirect sources". An "indirect source" includes structures that "may

attract mobile sources of pollution", 42 U.S.C. § 7410(a)(5)(C), presumably cars, buses, etc. Under an "indirect source review program", the state may provide for a review of indirect sources of air pollution and for the development of measures that will "assure, or assist in assuring," that a new or modified indirect source will not lead to nonattainment of the NAAQS or prevent the maintenance of the NAAQS. 42 U.S.C. § 7410(a)(5)(D).

In exercising its discretion under the CAA to include an indirect source review program in its SIP, the state chose to use the SEQRA EIS process at the means by which the environmental impact of an indirect source would be evaluated. The 1984 SIP, which was approved by the EPA in 1985, *see* 40 C.F.R. § 52.1673(a), provides that "[t]he primary mechanism for comprehensive evaluation of major projects which may have a significant impact on air quality is the environmental impact statement (EIS). EIS's are required by either the National Environmental Policy Act (NEPA), the State Environmental Quality Review Act (SEQRA), or the New York City Environmental Quality Review (CEQR)." 1984 SIP at § 3.6 (Changing Traffic Patterns). SEQRA, in turn, requires that, in preparing an EIS, agencies "choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process." N.Y. Envtl. Conserv. Law § 8-0109.1 (McKinney 1984). Thus, project approval was subject to the indirect source review program that New York voluntarily included in the 1984 SIP, which it adopted pursuant to CAA requirements. The SEQRA EIS process was the mechanism that the UDC used to evaluate the potential impact of the project on air quality.

B. *Project Approval.*

In this case, UDC, as the lead agency for the project, *see* N.Y. Envtl. Conserv. Law § 8-0111.6; 6 N.Y. Comp. Code Rules & Regs. tit. 6, § 617.6, prepared a draft EIS, held public hearings, received and reviewed written and oral public comments, revised the EIS, and published a final EIS. *See* 6 N.Y. Comp.

Code Rules & Regs. tit. 6, § 617.8 (Environmental impact statement procedures); 503 N.Y.S.2d at 304, 494 N.E. 2d at 435. After considering "social, economic and other factors", as well as relying on the final EIS, UDC approved the project on October 4, 1984, and set forth its findings and conclusions pursuant to SEQRA and part 617 of the New York Code of Rules and Regulations. *See* N.Y. State Urban Dev. Corp., *Findings With Respect to 42nd Street Development Project, New York, New York*, Oct. 4, 1984, at 1, 43-44 [hereinafter cited as UDC Report]. The portions of the UDC report that are most important for our purposes concern (1) existing air quality and the projected impact of the project on air quality and (2) mitigation of traffic and air quality impacts.

Under "Existing Project Area Conditions", that is, the conditions that prevailed in 1984, long before any construction was to begin, UDC found that "under adverse meteorological and traffic conditions, the [carbon monoxide] standard for the peak eight-hour period of the day (average of 9 parts per million (ppm) per hour) is exceeded at ten of the eleven project area receptor locations". UDC Report at 15-16.

Under "Project Impacts", that is, the overall effect after the project is completed, UDC concluded that "without traffic mitigations, violations of the eight-hour carbon monoxide standard of 9 ppm would occur at several locations in 1991 under peak traffic and meteorological conditions", but that with mitigation, carbon monoxide concentrations within the project area would, depending on the exact location, either (1) be below the 9 ppm standard; (2) exceed the 9 ppm standard by only de minimis amounts (*i.e.* 9.3 ppm); or (3) be lower than would be the case without the project. UDC Report at 26-27.

UDC made similar findings regarding impacts during project construction: without mitigation the 9 ppm standard would be exceeded in a number of project area locations during construction, but with mitigation measures, two locations at most would exceed the 9 ppm standard during temporary traffic diversion. At one of these locations, the standard would be exceeded by only de minimis amounts. UDC Report at 29-30.

Mitigation measures designed to handle the projected 1991 traffic volume within the project area were incorporated into the project plan and approved by UDC. They included (1) a traffic lay-by lane to provide standing and drop-off space for buses and taxis that now block traffic, (2) relocation of a taxi stand, (3) revised and more effectively enforced "no standing" regulations, (4) revised signal timing, and (5) additional traffic enforcement agents. UDC Report at 23.

At the conclusion of its report, under "Findings Pursuant to the State Environmental Quality Review Act", UDC concluded:

> Based on the foregoing and having fully considered the FEIS and considered, determined and found the matters set forth above, UDC hereby (*a*) finds that all requirements of SEQRA and Part 617 have been met in preparation and consideration of the FEIS and (*b*) makes the following additional findings:
>
> (1) consistent with the social, economic and other essential considerations, from among the reasonable alternatives thereto, the action to be approved is one which minimizes or avoids adverse environmental effects to the maximum extent practicable, including the effects disclosed in the Final Environmental Impact Statement; and
>
> (2) consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided by incorporating as conditions to the decision those mitigating measures which were identified as practicable.

UDC Report at 43-44. These findings, which UDC made pursuant to SEQRA's requirements, were based on the findings regarding air quality that it had made by using CAA's 9 ppm standard to measure the impact of the project on air quality and to evaluate the effectiveness of proposed mitigation measures.

On November 9, 1984, after holding public hearings, the New York City Board of Estimate expressly adopted UDC's findings and approved the project.

C. *The CAA Suit: Plaintiffs' Proposed Amended Complaint.*

One day before plaintiffs commenced this action, the New York Appellate Division affirmed the dismissal of plaintiffs' SEQRA challenges to UDC's analysis of traffic and air quality impacts and their claims of procedural defects in the EIS process. *Jackson*, 110 A.D.2d 304, 494 N.Y.S.2d 700. The Court of Appeals affirmed, 67 N.Y.2d 427, 503 N.Y.S.2d 298, 494 N.E.2d 429. In this case, plaintiffs' original complaint contained four claims for relief premised essentially on the argument that the project would prevent attainment of the NAAQs. After he dismissed the original complaint for failure to state a claim, Judge Griesa granted leave to submit a proposed amended complaint but cautioned plaintiffs that they must allege specific violations of an SIP or some other statutory provision in order to state a claim cognizable under the citizen suits provisions. He also noted that plaintiffs must show why they are entitled to the injunctive relief they are seeking and warned that even if a provision of the SIP is violated, "it does not follow that the project gets enjoined". Transcript of June 26, 1986 argument at 10, *Wilder v. Thomas*, 659 F.Supp. 1500 (S.D.N.Y.1987) (Griesa, *J.*).

The plaintiffs' proposed amended complaint set forth six claims for relief, all based on defendants' alleged failures to comply with 1984 SIP.

1. The first claim, "Failure to eliminate carbon monoxide 'hot spots' caused by the Project by 1987", alleges that it is a "condition or requirement" of the 1984 SIP, § 3.5.3, that all carbon monoxide hot spots be eliminated by December 31, 1987, and that construction of the project will "assure the continued existence" of hot spots in the project area after the deadline. The various defendants are alleged to be liable for this anticipated

SIP violation because they, or their appointees, have allowed the project to go forward despite the predicted continued existence of hot spots.

2. The second claim, "Failure to require Project air pollution mitigation measures to be effective", is based on § 3.6(A) of the 1984 SIP, which provides:

> To further insure that the carbon monoxide standard is attained in New York City, if an EIS for a project proposal identifies a violation or exacerbation of the carbon monoxide standard, then the City commits to assure that mitigating measures will be implemented by the project sponsor or City, so as to provide for attainment of the standard by December 31, 1987 and maintenance of it thereafter.

1984 SIP at 3-24. The complaint alleges that defendants failed to commit to, or to seek the City's commitment to, mitigation measures for the project that would be effective to "prevent violation of, and assure maintenance of" the NAAQS after December 31, 1987.

3. The third claim, "Failure to compute carbon monoxide emission reductions in prior years for Midtown Manhattan", refers to the 1984 SIP § 1.6, which requires that DEC

> will compute, for each pollutant, emission reductions achieved during the calendar year through implementation of control measures on permitted sources, area source, and mobile sources. Actual reductions thus calculated will be compared with those predicted in the SIP. Shortfalls, if any, will be discussed as to their effect on RFP [reasonable future progress] in future years.
>
> * * * * * *
>
> A summary of emission reductions resulting from control measures and other influencing factors will be prepared and a graphical comparison made between the growth and control line and the RFP line included in the SIP.

*Id.* at 1-10. The complaint alleges that DEC delegated this reporting duty to DEP but that neither DEC nor DEP had computed or reported carbon monoxide emissions for midtown Manhattan for 1985.

4. The fourth claim, "Failure to address Project interaction with other changes in West Midtown", refers to § 3.6 of the 1984 SIP, which requires that the annual report "give special attention to significant changes in the West Midtown area and to any mitigating measures that might be necessary in that area." *Id.* at 3-25. Section 3.6 also requires that the EIS for new projects be used to provide the underlying information for the annual report. *Id.* at 3-23, 3-24. The complaint alleges that the defendants breached these duties under the SIP by (1) not requiring the production of materials in the EIS that were necessary in order to give special attention to the midtown area in the annual report; (2) not giving special attention to significant changes in the midtown area (*i.e.*, the interaction between the project, the Javits Center, and the changing traffic flow patterns generated by the center); and (3) failing to describe these significant changes "realistically" in the annual report.

5. The fifth claim, "Effectiveness of carbon monoxide mitigation measures for Project not determinable", refers again to § 3.6 of the 1984 SIP and alleges that the responsible agencies have failed to provide computations and reports on emissions reductions that are required by the SIP and necessary for the evaluation of the effectiveness of project mitigation measures.

6. The sixth claim, "SIP evaluation of Project effect or emissions did not occur before Project approval", refers to that part of § 3.6 of the 1984 SIP that designates the EIS as "[t]he primary mechanism for comprehensive evaluation of major projects which may have a significant impact on air quality". *Id.* at 3-23. Like the second claim, this claim relies as well on the statement in § 3.6 that the city "commits to assure" that adequate mitigation measures will be implemented to assure attainment and maintenance of the NAAQS. *Id.* at 3-24. In essence this claim alleges that DEC and DEP violated the SIP by not reviewing the project EIS prior to project approval by the UDC.

Plaintiffs seek (1) a declaration that the planning for and approval of the project has resulted in SIP violations; (2) an injunction against construction of the project; (3) a direction that defendants DEC, DEP, Schultz, and Williams carry out their duties to enforce the SIP; and (4) costs and attorneys' fees.

Prior to denying plaintiffs leave to file their proposed amended complaint, Judge Griesa reviewed the complaint at length and concluded that "there is no indication that the deficiencies in plaintiffs' claims can be cured by further amendment." He found further that plaintiffs were barred from relitigating the adequacy of UDC's analysis of the project's impact on traffic and air quality, and the adequacy of the mitigation measures approved by UDC. Thus, Judge Greisa ultimately found the proposed amended complaint legally insufficient and denied plaintiffs any opportunity to further amend their pleading. On this appeal we view his decision as if the amended complaint had been filed and then subject to review under Fed.R.Civ.P. 12(b)(6).

For the following reasons, we affirm the order of the district court.

## II. DISCUSSION

In the discussion to follow we will, first, examine the scope of the citizen suits provision to determine whether the plaintiffs' first claim falls within that scope. Next, we will address the collateral estoppel effect on plaintiffs' second, fourth, and fifth claims of the state court judgment in *Jackson*, 110 A.D.2d 304, 494 N.Y.S.2d 700. Finally, we will address the sufficiency of the third claim, which is based on reporting requirements, and of the sixth claim for relief.

### A. *Scope of the Citizen Suits Provison/The First Claim for Relief.*

Citizen suits are an important aspect of the CAA enforcement scheme. *See Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir.1976); *Natural Resources Defense Council, Inc. v. Train*,

510 F.2d 692, 699-700 (D.C.Cir.1974). In enacting this provision, congress expanded federal court jurisdiction by circumventing the diversity of citizenship, jurisdictional amount, and traditional standing requirements, *see* 535 F.2d at 172-73; 510 F.2d at 700; S.Rep. No. 91-1196, 91st Cong., 2d Sess., *reprinted at* Appendix B, 510 F.2d at 725, in order to allow citizens to bring suit against the administrator of EPA for failure to perform nondiscretionary duties, or against polluters, including government agencies and the United States, for violation of specific requirements of an SIP. *See* 510 F.2d at 700; S.Rep. No. 91-1196, *reprinted at* 510 F.2d at 725.

Congress intended citizen suits to "motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings" against violators. S.Rep. No. 91-1196, *reprinted at* 510 F.2d at 723. *See* 510 F.2d at 700. In order to avoid either overburdening the courts, or unduly interfering with implementation of the act, however, congress carefully circumscribed the scope of the provision by authorizing citizens to bring suit only for violations of specific provisions of the act or specific provisions of an applicable implementation plan. *See* S.Rep. No. 91-1196, *reprinted at* 510 F.2d at 723, *see also Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 63 (2d Cir.1985) (discussing congressional purpose in limiting citizen suits). By the specificity requirements congress sought to establish "an objective evidentiary standard [that] would have to be met by the citizen who brings an action under [§ 7604]", and thereby eliminate the need for "reanalysis of technological or other considerations at the enforcement stage." *See Citizens Ass'n of Georgetown the Committee of 100 on the Fed. City v. Washington*, 535 F.2d 1318, 1322 (D.C.Cir.1976) (citation omitted).

[1] Thus, plaintiffs are limited under § 7604 to seeking relief from specific violations of existing SIPs; they may not, through a citizen suit, obtain modification of an SIP to conform with their own "notion of proper environmental policy." *Action for Rational Transit v. West Side Highway Project*, 699 F.2d 614, 616 (2d Cir.1983). Such a claim must be addressed directly to

the court of appeals, which has exclusive jurisdiction to review EPA approval of SIPs. *See id.*; 42 U.S.C. § 7607(b)(1).

Section 7604(a)(1)(A) allows any person to bring a suit against an individual or government agency who violates an "emission standard or limitation" under the CAA. The statutory definition of "emission standard or limitation" includes "any condition or requirement under an application implementation plan relating to transportation control measures". 42 U.S.C. § 7604(f)(3).

[2] Plaintiffs contend that their first claim alleges a specific violation of an existing SIP because the elimination of carbon monoxide hot spots by 1987 is a condition or requirement relating to a transportation control measure. We disagree.

In prior cases we have recognized the limitations that congress has placed on the exercise of jurisdiction over citizen suits under § 7604. *See Council of Commuter Orgs. v. Metro. Transp. Authority,* 683 F.2d 663, 670 (2d Cir.1982) (plaintiffs seeking to bring a citizen suit "for violation of an emission standard or limitation contained in an applicable plan * * * must allege a violation of a specific strategy or commitment in the SIP and describe, with some particularity, the respects in which compliance with the provision is deficient") (footnote omitted); *Action for Rational Transit v. West Side Highway,* 699 F.2d at 616 ("[t]he aims and goals of the SIP are not enforceable apart from the specific measures designed to achieve them").

In *Council of Commuter Orgs. v. Metro. Transp. Authority,* we suggested that claims relating to a mass transit improvement provision in New York's SIP and including an allegation that New York City violated a fare stabilization strategy by increasing transit fares were "arguably sufficient to state a claim" under the citizen suits provision. 683 F.2d at 671. We stated, however, that "vague and conclusory assertions [such as] 'Failure to make reasonable further progress in the 1979 SIP implementation' [and] 'Failure to rehabilitate/improve reliability, safety, etc. of region's transit system' followed by citation to large chunks of

New York's SIP as the allegedly violated provision" were insufficient to sustain a citizen suit. *Id.* at 670. Plaintiffs' first claim, which alleges, in essence, that the city has failed, or will fail, to attain the NAAQS in the project area thus falls short of this requirement of specificity.

Plaintiffs' construction of the CAA would eliminate the distinction between the NAAQS and measures that are designed to assure attainment of the NAAQS. The CAA and the regulations promulgated thereunder, however, emphasize the distinction between the attainment of the NAAQS, which is a goal of the CAA, and the specific provisions of an SIP which are the only permissible subjects of a citizen suit. As we have noted, plaintiffs contend that their first claim alleges a violation of a condition or requirement relating to a transportation control measure. The EPA has defined a transportation control measure, however, as "any measure that is directed toward reducing emissions of air pollutants from transportation sources". 40 C.F.R. § 51.100(r) (1987). *See Council of Commuter Orgs. v. Metro. Transp. Authority*, 683 F.2d at 666 n. 2 (" 'transportation control measures' are strategies designed to reduce pollution by limiting or controlling motor vehicle use"). *See also* 42 U.S.C. § 7604(f)(3) (including "any condition or requirement under an applicable implementation plan relating to transportation control measures" within the meaning of "emission standard or limitation"). The statutory and regulatory language indicates that a "transportation control measure" is designed to help achieve the goal of reducing pollution, and to assure attainment of the NAAQS.

The NAAQS for carbon monoxide, by contrast, is the standard established by the EPA pursuant to congressional directive, *see* 42 U.S.C. § 7409(a); 40 C.F.R. § 50.8 (1987), that the EPA determined the states must attain in order to effectuate congress's goal: "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population". § 7401(b)(1). *See Concerned Citizens of Bridesburg*, 836 F.2d at 780. Section 7604 does not provide for citizen suits based on violation of, or failure to attain, the NAAQS itself.

Our conclusion that the NAAQS is not itself a specific provision of an SIP, which is the only permissible subject of a citizen suit, is further supported by the text of § 7410(a)(2)(B), which requires that the administrator approve a proposed SIP if

> it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures *as may be necessary to insure attainment and maintenance of such primary or secondary standard*, including, but not limited to, transportation controls, air quality maintenance plans and preconstruction review of direct sources of air pollution as provided in subparagraph (D) (emphasis added).

Thus, the enumerated categories of SIP requirements are designed to "insure attainment" of the NAAQS; the NAAQS is not, itself, within the categories of SIP requirements and it is not transformed from a standard into a requirement merely because the SIP states "that all hot spots will be eliminated by the end of 1987." 1984 SIP at 3-21. This statement is simply, as the district court found, a restatement of the CAA's requirement that the NAAQS for carbon monoxide be attained by Dec. 31, 1987. *See* 42 U.S.C. § 7502(c) (date for attainment of NAAQS).

Plaintiffs also argue that because the SIP contains a commitment to "[t]he ongoing process of identifying and analyzing carbon monoxide hot spots and * * * to the implementation of measures specific to each hot spot as is found necessary", 1984 SIP at 1-5, there will be a violation of a condition or requirement of the SIP relating to a transportation control measure because hot spots will allegedly persist in the project area after 1987, during construction and after completion of the project, in spite of the mitigation measures approved by the UDC. Putting aside for the moment the questions of whether the plaintiffs are estopped from litigating the sufficiency of the mitigation measures (see part II, *infra*), and of whether the plaintiffs could obtain an injunction against the project even if they could show that hot spots will persist in the project area after 1987

(an issue we need not reach), we think that plaintiffs' construction of the statute would contravene congressional intent and render superfluous the clear statutory distinctions between the NAAQS and the types of specific strategies congress meant to be enforceable through citizen suits.

[3,4] Plaintiffs argue that the district court's interpretation of the citizen suits provision would render meaningless the words "relating to" in § 7604(f)(3). Not so. There are circumstances where the term "condition or requirement relating to a transportation control measure" would retain significance. For example, the city has committed to the process of identifying and analyzing hot spots and to implementing measures specific to each hot spot in order to attain the NAAQS. A commitment to changing traffic flow patterns at a particular hot spot is a commitment to a "transportation control measure". A condition or requirement *relating to* that transportation control measure is the installation of a new traffic signal system. *See* 1984 SIP at 3-16 (Area Wide Control Measures). Under this view a suit could be brought by a citizen if the state (a) failed to obtain the list of candidate hot spots from local transportation planning agencies as required by 1984 SIP 3.2 (Selection of Candidate Hot Spots); or (b) failed to implement the specific requirement relating to a transportation control measure designed to eliminate the hot spot, *i.e.*, installation of a new traffic signal system.

Contrary to plaintiffs' contention, our interpretation does not trivialize or emasculate the citizen suits provision; rather, it adheres to the statutory language while effectuating both the congressional purpose of fostering enforcement and the equally important purpose of providing specific, objective standards for citizen suits.

B. *Collateral Estoppel.*

[5] Several of plaintiffs' additional claims challenge the adequacy of the mitigation measures the UDC approved as sufficient

to lower carbon monoxide levels in the project area. Before we take up these claims in detail, we must consider whether collateral estoppel precludes plaintiffs' relitigation of the adequacy of the mitigation measures approved by UDC. If it does, the second, fourth, and fifth claims, which rely on alleged deficiencies in the EIS process, must fail.

1. *Overview of collateral estoppel.*

Collateral estoppel, or issue preclusion, is the branch or *res judicata* doctrine that prevents a party from relitigating an issue of fact or law that has been decided in an earlier suit. *See Murphy v. Gallagher*, 761 F.2d 878, 879 (2d Cir.1985). Federal courts are required by 28 U.S.C. § 1738 to give effect to the collateral estoppel rules of the state that rendered a prior judgment where the same issues are raised later in a federal proceeding. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984) (citing *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466, 102 S.Ct. 1883, 1889, 72 L.Ed.2d 262 (1982); *Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980)); *Cameron v. Fogarty*, 806 F.2d 380, 384 (2d Cir.1986), *cert. denied*, __U.S.__, 107 S.Ct. 1894, 95 L.Ed.2d 501 (1987). Thus, our determination of the preclusive effect of the prior New York judgment in this case requires an analysis of the collateral estoppel effect that would be accorded the prior judgment under New York's standards for collateral estoppel. *See Migra*, 465 U.S. at 81, 104 S.Ct. at 896 (in the absence of federal law modifying § 1738, the preclusive effect of the state judgment is determined by that state's law); *Kremer*, 456 U.S. at 481-82, 102 S.Ct. at 1898 (§ 1738 "commands a federal court to accept the rules chosen by the State from which the judgment is taken").

If the elements of collateral estoppel under New York law are otherwise satisfied, the New York courts' affirmance of the results of the UDC administrative process are entitled to preclusive effect. *See Kremer*, 456 U.S. at 480, 485, 102 S.Ct. at 1896, 1899; *Mitchell v. Nat'l Broadcasting Co.*, 553 F.2d 265, 276 (2d Cir.1977); *Capital Tel. Co. v. Pattersonville Tel. Co.*, 56 N.Y.2d 11, 17, 451 N.Y.S.2d 11, 13, 436 N.E.2d 461, 462 (1982). In *Kremer*,

the Supreme Court gave preclusive effect to a New York court judgment affirming an agency (New York State Division of Human Rights) determination that there was no probable cause to believe that an employer had engaged in discriminatory practices. 456 U.S. at 463-64, 485, 102 S.Ct. at 1888, 1899. The Court emphasized that in order to qualify for full faith and credit under § 1738, state proceedings need only satisfy the requirements of due process and be sufficient to be entitled to preclusive effect in the courts of that state. *Id.*, at 481, 102 S.Ct. at 1897-98.

Relying on *Zanghi v. Inc. Village of Old Brookville*, 752 F.2d 42 (2d Cir.1985), plaintiffs argue that the collateral estoppel cannot apply in this case because UDC's findings were made in a legislative, rather than adjudicatory, capacity. *See id.* at 46 (collateral estoppel applies " 'to the quasi-judicial determinations of administrative agencies when rendered pursuant to adjudicatory authority' ") (citing *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 496, 478 N.Y.S.2d 823, 825-26, 467 N.E.2d 487, 489-90 (1984)). But *Zanghi* and *Ryan* involved the application of collateral estoppel directly to administrative proceedings, and this case, like *Kremer*, involves the collateral estoppel effect to be given after judicial review of an administrative determination. *See Kremer*, 456 U.S. at 481, n. 21, 102 S.Ct. at 1897 n. 21 ("It is well established that judicial affirmance of an administrative determination is entitled to preclusive effect. There is no requirement that judicial review must proceed *de novo* if it is to be preclusive.") (citations omitted).

New York's requirements for collateral estoppel were articulated in a leading case, *Schwartz v. Pub. Adm'r of Bronx*, 24 N.Y. 2d 65, 71, 298 N.Y.S.2d 955, 960, 246 N.E. 2d 725, 729 (1969), as follows:

> New York Law has now reached the point where there are but two necessary requirements for invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair

> opportunity to contest the decision now said to be controlling.

*See Ryan*, 62 N.Y.2d at 500-02, 478 N.Y.S. 2d at 826-27, 467 N.E.2d at 490-91; *Capital Tel.*, 56 N.Y.2d at 13, 451 N.Y.S.2d at 13, 436 N.E.2d at 463, *Gilberg v. Barbieri*, 53 N.Y.2d 285, 292, 441 N.Y.S.2d 49, 51, 423 N.E.2d 807, 809 (1981); *Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481, 484, 414 N.Y.S.2d 308, 310-311, 386 N.E.2d 1328, 1330-31 (1979).

Thus, we must determine whether the issue of the adequacy of the mitigation measures approved by UDC was an issue that was determined and necessary to the judgment in the New York court, and whether the parties who would be precluded from relitigating that issue in federal court had a full and fair opportunity to litigate the issue in state court.

2. *Identity of issues*

In New York "collateral estoppel is a flexible doctrine which can never be rigidly or mechanically applied". *Gilberg*, 53 N.Y. 2d at 292, 441 N.Y.S.2d at 51, 423 N.E.2d at 809 (citations omitted). Nevertheless, the requirement of identity of issues, unlike the requirement of identity of parties, is an absolute requirement. *See Gramatan*, 46 N.Y.2d at 486, 414 N.Y.S.2d at 311, 386 N.E.2d at 1331. Because this case arises in the context of the "labyrinth that is the Clean Air Act," *Connecticut v. Envtl. Protection Agency*, 696 F.2d 147, 150-51 (2d Cir.1982); *see Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 865, 104 S.Ct. 2778, 2793, 81 L.Ed. 2d 694 (1984), determining whether the issues are identical is not easy. Nevertheless, a careful examination of the facts in the context of the joint state and federal responsibilities established by the act, *see Concerned Citizens of Bridesburg*, 836 F.2d at 780; *Conn. v. EPA*, 696 F.2d at 151, leads us to conclude that the issues in this case and the state court litigation are, indeed, identical.

In the New York appellate division, plaintiffs appealed from that portion of the judgment of the supreme court, New York County, that dismissed their challenges to UDC's analysis of the

project's impact on traffic and air quality and their claims that UDC's environmental review of the project's impact was procedurally deficient. *Jackson*, 110 A.D.2d 304, 305, 494 N.Y.S.2d 700, 701 (1st Dep't 1985). The appellate division reviewed both the procedural and the substantive aspects of the UDC's environmental analysis in order to determine whether UDC had complied with SEQRA's requirements. *Id.* at 308, 494 N.Y.S.2d at 703.

The appellate division agreed with the trial court's rejection of plaintiffs' claims concerning UDC's traffic and air quality analysis. *Id.* at 310, 494 N.Y.S.2d at 704. The court found that UDC had provided sufficient opportunity for public participation in the project's air pollution analysis, and rejected plaintiffs' claims that there were omissions and errors in the analysis of traffic and air quality impacts. *Id.*, 494 N.Y.S.2d at 704. The court found as well that UDC had employed "the most appropriate computer model" to calculate automobile emissions, and that its calculations were reliable. *Id.*, 494 N.Y.S.2d at 704.

The appellate division addressed next the issue of the adequacy of the mitigation measures approved by UDC, one of the exact issues plaintiffs seek to relitigate here, and concluded:

> With regard to the obligation to mitigate the Project's adverse effects on traffic and air quality, UDC compiled detailed information and proposed extensive mitigative measures to minimize those adverse impacts and to meet the Federal Clean Air Act's standard for acceptable carbon monoxide levels. As part of its hard look at this problem UDC analyzed the traffic impact for both the Project's area and a large surrounding area. It adopted a "worst case" analysis, which included assuming peak hour traffic, simultaneous full use of all theatres, no diversion of traffic to less congested streets, and no increased enforcement of traffic regulations, to arrive at a very conservative model for traffic analysis. This same analysis was the basis for the air quality assessment.

> To meet the expected adverse impacts UDC studied and then proposed a multitude of mitigative measures which would place the area within federal and City guidelines on carbon monoxide levels and which in fact are expected to produce lower carbon monoxide concentrations than presently exist. Our review of UDC's analysis of the traffic and air quality impacts assures us that UDC identified the adverse traffic and air quality impacts, took a hard analytical look at them and proposed mitigative measures which, it had a reasonable basis to conclude, would in fact minimize those adverse effects. Special Term, therefore, correctly deferred to the judgment of UDC in this area.

*Id.* at 310-11, 494 N.Y.S.2d at 704. Thus, the appellate division held (1) that UDC had complied with the procedural requirements of SEQRA for the EIS process and (2) that UDC's approval of the mitigation measures that it had concluded were sufficient to minimize the project's adverse effects on traffic and air quality and sufficient to meet the NAAQS for carbon monoxide, was neither arbitrary nor capricious, nor unsupported by substantial evidence. *See id.* at 309, 494 N.Y.S.2d at 702, 704. In short, the state courts rejected plaintiffs' challenge to the adequacy of the mitigation measures.

The same adequacy issue that was decided by the state court is being raised by plaintiffs now in federal court. Plaintiffs argue, however, that the state SEQRA standards and the federal CAA standards are sufficiently distinct to preclude a finding of identity of issues here. *See Cullen v. Margiotta*, 811 F.2d 698, 732 (2d Cir.) ("issues are not identical when the standards governing them are significantly different") (citations omitted), *cert. denied*, __U.S.__, 107 S.Ct. 3266, 97 L.Ed.2d 764 (1987). In *Cullen* we held that a state court ruling that plaintiffs could not maintain a class action would not be given collateral estoppel effect because the state statute, N.Y.Civ.Prac. L. & R. § 1005, does not permit class actions for separate wrongs to separate persons, but Fed.R.Civ P. 23 does.

*Cullen* does not, however, control the disposition of the collateral estoppel issue in this case. First, substantive standards

under SEQRA and the CAA are not diametrically opposed as the class action rules were in *Cullen*; rather, the SEQRA EIS process is the mechanism that the state uses to evaluate indirect sources in order to insure attainment of the NAAQS. Furthermore, although the SEQRA standard (agency shall "choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects") does not, on its face, embody the absolute requirement that the NAAQS be attained by a specific date, that UDC, during the EIS process and in its report, and the parties, in their pleadings and arguments before the state and federal courts, all looked to the NAAQS as "the standard" that must be attained.

Second, the standards for review of agency determinations in New York State and in federal courts are essentially the same. *Compare* N.Y.Civ.Prac. L & R. § 7803 *with* 5 U.S.C. § 706. *See Jackson*, 110 A.D.2d at 307-08, 494 N.Y.S.2d at 703 (court determines "whether the agency has complied with the applicable law, identified the relevant areas of environmental concern, taken a 'hard look' at them and made a reasoned elaboration of the basis for its determinations") (citations omitted); *Aldrich v. Pattison*, 107 A.D.2d 258, 265, 486 N.Y.S.2d 23, 29 (2d Dep't 1985) (state court applies federally derived standard to EIS review); *H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222, 231, 418 N.Y.S.2d 827, 832 (4th Dep't 1979) (state standard of administrative review derived from federal NEPA cases). Nevertheless, while the plaintiffs concede that the New York judgment controls on the issue of whether UDC's findings with regard to mitigation measures were "reasonable", they suggest that the judgment is somehow not controlling in this case because the New York court did not decide that UDC's findings were "true, or even * * * supported by a preponderance of the evidence." Appellants' brief at 32-33. Because plaintiffs would not have been entitled to such a determination in federal court either, this argument is totally unsupportable. "The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences", *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21, 96 S.Ct. 2718, 2730 n. 21, 49 L.Ed.2d 576 (1976),

and to "make a 'reasoned elaboration' of the basis for its determination". *H.O.M.E.S.*, 69 A.D.2d at 231, 418 N.Y.S.2d at 832 (citing *City of Rochester v. U.S. Postal Service*, 541 F.2d 967, 973 (2d Cir. 1976)).

Even if the issue were properly before this court, or if it had come to us in the first place, our review of the sufficiency of the project's mitigation measures would have been the same as the state court's because SEQRA's EIS process was designated in the SIP as the primary mechanism for indirect source review. Plaintiffs argue that the inquiry in federal court would be different because the NAAQS is an absolute, objective requirement that they suggest would be somehow more difficult to satisfy than the SEQRA standard. The record indicates, however, that throughout its evaluation and report on the project UDC utilized the federal nine ppm standard for carbon monoxide incorporated in the NAAQS. Thus, even if UDC could have applied a less stringent standard to satisfy SEQRA's requirements, it did not in fact do so.

Furthermore, the appellate division found that UDC had a reasonable basis to conclude that the mitigation measures would enable the project to meet the federal CAA standards, *see* 110 A.D.2d at 311, 494 N.Y.S.2d at 704, and this conclusion was approved by the New York Court of Appeals, 67 N.Y.S.2d 400, 426, 503 N.Y.S.2d 298, 311, 494 N.E.2d 429, 441 (1986).

The pleadings in the two cases provide further support for our finding of identity of issue. *See Watts v. Swiss Bank Corp.*, 27 N.Y.2d 270, 278, 317 N.Y.S.2d 315, 321, 265 N.E.2d 739, 744 (1970) (finding of identity supported by comparison of pleadings); *see also Mother's Restaurant, Inc. v. Mama's Pizza*, 723 F.2d 1566, 1570 (Fed. Cir.1983) (court looked to parties' pleadings to ascertain whether an issue was actually litigated); *Nelson v Swing-A-Way Mfg. Co.*, 266 F.2d 184, 187 (8th Cir. 1959) ("'look to the pleadings * * * and examine the record to determine the questions essential to the decision of the former controversy'") (quoting *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 459, 42 S.Ct. 363, 366, 66 L.Ed. 708 (1922)). Plaintiffs themselves raised the issue of the adequacy of the

mitigation measures under CAA standards in their Article 78 petition. Verified petition ¶¶ 21, 22, 25, *Rosenthal v. New York State Urban Dev. Corp.*, No. 3020/85 (Sup.Ct.N.Y.Cty. June 15, 1985). The language in the second claim for relief in plaintiffs' proposed amended federal complaint ("Failure to require Project air pollution mitigation measures to be effective") duplicates, to a great extent, the language in the first claim for relief in the state Article 78 proceeding ("The FEIS fails to address adequately the air pollution effects of the Project"). Both claims allege, essentially, that UDC failed to obtain the city's commitment to mitigation measures sufficient to meet the NAAQS.

3. *Issue necessary to state court's judgment.*

As we previously noted, under New York's collateral estoppel principles, even if the identical issue was decided in the state court, that decision must also have been necessary to the court's judgment. *Kleinberger v. Town of Sharon*, 116 A.D.2d 367, 369, 501 N.Y.S.2d 746, 747 (3d Dep't 1986) ("'a judgment does not work an estoppel as to unessential facts, even though put in issue by the pleadings and directly decided'") (citing *Silberstein v. Silberstein*, 218 N.Y. 525, 113 N.E. 495 (1916)). In this case, the federal and state statutory schemes are highly interrelated and both the parties and the courts relied on the federal standard in assessing UDC's compliance with SEQRA. In short, the adequacy of the mitigation measures under the CAA was, as a practical matter, a necessary component in the state court's decision. *Cf. Dennis v. Rhode Island Hospital Trust Nat'l Bank*, 744 F.2d 893, 899 (1st Cir.1984) ("An issue may be 'actually' decided even if it is not *explicitly* decided, for it may have constituted, logically or practically, a necessary component of the decision reached.") (emphasis in original). This is not a case where the state court made "an incidental or collateral determination of an issue that was not material" that should not be accorded preclusive effect in a later litigation. *See* IB J. Moore, *Moore's Fed. Prac.* ¶ 0.443 [5.-1].

4. *Full and fair opportunity to litigate the issue.*

We conclude as well that the plaintiffs had a full and fair opportunity to litigate this issue in the state court. The factors

that a New York court would consider in determining whether plaintiffs had a full and fair opportunity include "the size of the claim, the forum of the prior litigation, * * * the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and forseeability of future litigation." *Schwartz*, 24 N.Y.2d at 72, 298 N.Y.S.2d at 961, 246 N.E.2d at 729.

[6] Here, plaintiffs do not seek money, but the underlying controversy in the state case – viability of the project – was the same as the one now before this court. The state claims were litigated through two levels of appeal by the same highly qualified counsel as appears before this court. There is no new evidence germane to the issue, and no suggestion of a compromise verdict. Moreover, the differences in applicable law are a matter of form rather than substance, and plaintiffs were not only in the best position to foresee the possibility of future litigation, they were actually prepared with the complaint in this case and filed it immediately after they lost the state action. Simply because application of collateral estoppel in this federal action to an issue decided in state court might deprive plaintiffs of the opportunity to litigate here a claim that is based, in part, on federal law does not, of itself, render the doctrine inapplicable. *See Murphy v. Gallagher*, 761 F.2d 878, 885-86 (2d Cir.1985) (even when federal court action raises claims within exclusive federal jurisdiction, collateral estoppel may apply to component issues).

5. *Identity of parties.*

[7] Finally, although two of the plaintiffs here, Brendan Gill and the Whitby Tenants' Association, were not parties in the state courts, there is sufficient privity between the two new plaintiffs and the state court petitioners, who are all plaintiffs in this case, to establish identity of parties. *See Green v. Santa Fe Industries, Inc.*, 70 N.Y.2d 244, 253, 519 N.Y.S.2d 793, 796, 514 N.E.2d 105, 107-08 (1987) ("to establish privity the connection between the parties must be such that the interests of the nonparty can be said to have been represented in the prior proceeding"); *Gramatan v. Home Investors Corp.*, 46 N.Y.2d at 486,

414 N.Y.S.2d at 311, 386 N.E.2d at 1331 (identity of parties is not an absolute requirement).

In both the state court petition and the proposed amended federal complaint, the named plaintiffs characterize themselves as individuals who work or live in the project area and who will be injured in their enjoyment of the project area if the project is built. *See Rosenthal v. New York State Urban Dev. Corp.*, verified petition at ¶ 10, No. 3020/85 (Sup.Ct.N.Y.Cty. June 15, 1985) (petitioners "will be injured in their enjoyment of the area if the Project is allowed to proceed without a proper review of its environmental impacts"); *Wilder v. Thomas*, 659 F.Supp. 1500 amended complaint at ¶ 8, 85 Civ. 8356 (S.D.N.Y. July 16, 1986) (plaintiffs "will be injured in their health and their enjoyment of the Project area if the Project is built and results in violations of the SIP").

Significantly, the issues raised in the two proceedings are such that they do not vary according to individual plaintiffs. *See Katz v. Blum*, 460 F.Supp. 1222, 1224 (S.D.N.Y. 1978) (dicta), *aff'd without opinion*, 603 F.2d 213 (2d Cir.1979); *see also Amalgamated Sugar Co. v. NL Industries*, 825 F.2d 634, 640-41 (2d Cir.) (where nonparties' interests were adequately represented in earlier litigation, they may be bound), *cert. denied*, __ U.S. __, 108 S.Ct. 511, 98 L.Ed.2d 511 (1987).

[8] In addition, it is appropriate to allow the state and city defendants to invoke defensive collateral estoppel even though they were not parties to the state court proceeding. Mutuality of estoppel is no longer an essential part of collateral estoppel doctrine. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-27, 99 S.Ct. 645, 649, 58 L.Ed.2d 552 (1979); *Blonder-Tongue Labs, Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 350 91 S.Ct. 1434, 1453, 28 L.Ed.2d 788 (1971); *LaRocca v. Gold*, 662 F.2d 144, 149 (2d Cir.1981); *Schwartz*, 24 N.Y.2d at 70, 298 N.Y.S.2d at 959, 246 N.E.2d at 728. There is no reason in this case to permit plaintiffs to relitigate an issue that was decided adversely to them in state court merely because they have joined additional defendants this time around. *See Township of Hopewell v. Volpe*, 446 F.2d 167, 171 (3rd Cir.1971). The central question is whether

the plaintiffs have had their day in court, *see id.*, and the answer here is "yes".

6. *Conclusion on collateral estoppel.*

The state court judgment establishes the sufficiency of the EIS process and the adequacy of the mitigation measures; plaintiffs are collaterally estopped from contesting those determinations. Consequently, plaintiff's second claim for relief must fail in its entirety. The fourth and fifth claims, which rely on alleged deficiencies in the EIS process, are also precluded on collateral estoppel grounds.

C. *Reporting Requirements.*

Although the third claim alleges a failure of DEC and DEP to report carbon monoxide emission reductions from midtown Manhattan for 1984 and 1985, plaintiffs have conceded that the reports have, in fact, been filed, but complain that the reports are deficient because they do not contain the types of graphical depictions contained in the 1979 SEP and do not compute emission reductions separately for each separate control measure.

Even if we found that a specific reporting requirement contained in an SIP could be a condition or requirement relating to a transportation control measure, and therefore the subject of a citizen suit, this claim would fail because the 1984 SIP does not require separate calculations for individual control measures.

D. *Sixth Claim.*

Finally, plaintiffs' sixth claim, which alleges in essence that the DEC and DEP should have reviewed the project EIS prior to project approval by the UDC, must also fail. First, the SIP does not contain a requirement that DEC or DEP make an "SIP review" of a project before the lead agency, in this case UDC, approves it. DEC will review the environmental effects of the project if and when a permit application is submitted for the project as required by N.Y.Comp. Codes Rules. & Regs. tit. 6, § 203.5 (1986). To the extent that the sixth claim relies

as well on the adequacy of the mitigation measures approved by UDC and adopted by the Board of Estimate when it approved the project, it is precluded on the collateral estoppel ground previously discussed.

The order of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Seventh day of September one thousand nine hundred and eighty-eight.

Present: HON. WILFRED FEINBERG, CHIEF JUDGE
HON. JAMES L. OAKES,
HON. GEORGE C. PRATT,
Circuit Judges

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STEPHEN F. WILDER, ET AL,

Plaintiff-Appellants,

V

LEE M. THOMAS, as ADMINISTRATOR of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL,

Defendants-Appellees.

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A petition for a rehearing having been filed herein by counsel for the plaintiff-appellants, Stephen F. Wilder, et al.,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is DENIED.

Elaine B. Goldsmith, Clerk
by:

/s/ Kathleen Brouwer
Kathleen Brouwer, Deputy Clerk

**Stephen F. WILDER, Brendan Gill, Imre J. Rosenthal, Stephen Rosenthal, Robert Neuwirth, Lori Jean Saigh, and the Whitby Tenants' Association, Plaintiffs,**

**v.**

**Lee M. THOMAS, as Administrator of the United States Environmental Protection Agency, et al., Defendants.**

No. 85 Civ. 8356.

United States District Court,
S.D. New York.

May 13, 1987.

## OPINION

GRIESA, District Judge.

This is an action arising out of the proposed 42nd Street Development Project. It is brought under the Clean Air Act, 42 U.S.C. §§ 7401, *et seq.*, specifically under the so-called "citizen suit provision" of the Act, 42 U.S.C. § 7604(a)(1).

Plaintiffs are individuals who live and work in the project area. A tenant's asociation is also named as a plaintiff. Defendants are various state and local agencies and officials involved with the Project. Originally plaintiffs sued certain federal defendants, but the claims against them have been withdrawn.

The original complaint was dismissed on June 26, 1986 for failure to state a valid claim. The court granted leave to amend, specifying what must be contained in an amended pleading. Plaintiffs then circulated a proposed amended complaint. Defendants objected, claiming that it was again inadequate. Plaintiffs have now briefed their motion to file the amended complaint, and defendants have briefed their opposition.

[1] Although leave to amend should be granted freely, *see* Fed.R.Civ.P. 15(a), a court may refuse to grant leave to refile where it is clear that the amended complaint, if filed, would be dismissed. *Foman v. Davis*, 371 U.S. 178, 1982, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *M & T Chemicals, Inc. v. International Business Machines Corp.*, 403 F.Supp. 1145, 1147 (S.D.N.Y.1975), *aff'd*, 542 F.2d 1165 (2d Cir.), *cert. denied*, 429 U.S. 1030, 97 S.Ct. 656, 50 L.Ed.2d 637 (1976).

Normally, on a motion such as the present one, the question would be the legal sufficiency of the amended complaint on its face. Here, however, both sides have referred to certain matters outside the complaint, and it is obvious that these matters must be considered in order to dispose of the present motion. Both sides agree on what is properly before the court.

**The Complaint**

The complaint alleges that the New York State Urban Development Corporation ("UDC") is a corporate governmental agency created under New York law and that UDC intends to construct the Project through a subsidiary (par. 11). It is alleged that UDC, in cooperation with City agencies, has prepared a plan covering 13 acres north and south of 42nd Street between Broadway and Eighth Avenue, and that the Project, if built, will fundamentally change the character of the area, increasing the level of commercial activity and the level of vehicular traffic (par. 17). The complaint alleges that these changes will significantly increase the emissions of carbon monoxide, an air contaminant regulated under the Clean Air Act (par. 18). Pursuant to the requirements of the State Environmental Quality Review Act ("SEQRA"), N.Y. Envtl. Conserv. Law §§ 8-0101, *et seq.* (McKinney 1984), UDC prepared an Environmental Impact Statement ("EIS") addressing traffic, air pollution and other impacts of the Project (par. 19). Following the preparation of the EIS, the Project was approved on October 4, 1984 (par. 65). It is alleged that other projects have been developed or are planned in the area, including the Javits Convention Center, and that the combined effect of these projects will lead to environmental problems (par. 20).

The complaint refers to the fact that, pursuant to the Clean Air Act, the United States Environmental Protection Agency

("EPA") has established national primary ambient air quality standards for carbon monoxide. The standard relevant to the present case is the requirement that concentration of carbon monoxide in the air shall not exceed a level of 9 parts per million ("9 ppm") over an 8-hour period more than once a year, on and after December 31, 1987 (par. 21). The complaint further refers to the statutory requirement that each state must adopt a state implementation plan, or "SIP", which is to provide for implementation and enforcement of the established air quality standards (par. 22). 42 U.S.C. § 7410(a)(1). The SIP must include

> emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance [of the air quality standards].

*Id.* at § 7410(a)(2)(B).

New York State has an SIP, which has been submitted in various stages. A revision dated January 1984 was approved by the EPA on June 17, 1985 (par. 23).

The complaint (par. 24) quotes the citizen suit provision of the Clean Air Act, that

> any person may commence a civil action on his own behalf ... (1) against any person ... who is alleged to be in violation of (A) an emission standard or limitation under [the Act]....

42 U.S.C. § 7604(a)(1).

The complaint further quotes the definition of "emission standard or limitation" relied upon by plaintiffs:

> (3) ... any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements....

*Id.* at § 7604(f).

The complaint notes the requirement of 42 U.S.C. § 7604(b)(1) that 60 days notice must be given to the EPA and others of the alleged violations prior to bringing suit, and states that such notice was given by letter of February 8, 1985 (par. 25).

The complaint then sets forth six claims for relief. The first claim bears the title "*Failure to eliminate carbon monoxide 'hot spots' caused by the Project by 1987.*" The first claim refers to the definition of "hot spot" in the SIP as any location with a potential to violate the carbon monoxide standard. The complaint notes that the SIP identifies certain hot spots in the vicinity of the Project and indicates that new hot spots may appear as conditions change or data improve (par. 27). The complaint alleges that it is a "condition or requirement" of the SIP that all carbon monoxide hot spots are to be eliminated by December 31, 1987, referring to the January 1984 SIP, p. 3-21, § 3.5.3 (comp. par. 28). It is further alleged that construction of the Project will "assure the continued existence" of hot spots in the Project area after the deadline of December 31, 1987 (par. 30). It is said that this will occur during construction of the Project, and also after completion of the Project because mitigation measures proposed by defendant UDC for the Project are not effective to eliminate hot spots in the project area (pars. 29-30). The various defendants are alleged to be responsible for this non-compliance with the SIP requirement of eliminating carbon monoxide hot spots by the end of 1987 (pars. 31-35).

The second claim for relief is given the title "*Failure to require Project air pollution mitigation measures to be effective.*" The second claim is based on the following provision of the SIP:

> To further ensure that the carbon monoxide standard is attained in New York City, if an EIS for a project proposal identifies a violation or exacerbation of the carbon monoxide standard, then the City commits to assure that mitigating measures will be implemented by the project sponsor or City, so as to provide for

> attainment of the standard by December 31, 1987 and maintenance of it thereafter.

(p. 3-24, § 3.6(A)) (comp. par. 37). The complaint alleges that the City has not committed to the necessary mitigation measures as required by this provision and that the various defendants have failed to perform their duty of obtaining such a commitment (pars. 39-42).

The third claim bears the title "*Failure to compute carbon monoxide emission reductions in prior years for Midtown Manhattan.*" The third claim is based on the provision of the SIP that the State Department of Environmental Conservation

> will compute, for each pollutant, emission reductions achieved during the calendar year through implementation of control measures on permitted sources, area sources, and mobile sources. Actual reductions thus calculated will be compared with those predicted in the SIP. Shortfalls, if any, will be discussed as to their effect on RFP [Reasonable Further Progress] in future years.
>
> * * * * * *
>
> A summary of emission reductions resulting from control measures and other influencing factors will be prepared and a graphical comparison made between the growth and control line and the RFP line included in the SIP.

(p. 1-10, § 1.6). It is alleged that computations and summaries for a given year must be made by July 1 of the following year (par. 44).

It is alleged that these analyses are necessary for a rational assessment of the impact of the Project (par. 45). The complaint alleges that the required analyses for 1984 and 1985, due on July 1, 1985 and July 1, 1986 respectively, have not been prepared (pars. 46-49).

The fourth claim is entitled "*Failure to address Project interaction with other changes in West Midtown.*" It is based on the

SIP requirement that an annual report give "special attention" to significant changes in the West Midtown area and to any mitigating measures that might be necessary for that area (p. 3-25, § 3.6(A)) (comp. par. 51). It is alleged that the EIS's for the various projects are to provide the underlying information (par. 51). The complaint alleges that these requirements have been violated, because there has been no "adequate assessment of future air quality" in the West Midtown area (par. 52). It is alleged that the various defendants did not require production of adequate materials for the Project's EIS, and did not render an adequate annual report regarding the interaction of this and other projects (pars. 53-56).

The fifth claim carries the title "*Effectiveness of carbon monoxide mitigation measures for Project not determinable.*" This claim refers to the same provision of the SIP involved in the fourth claim (p. 3-25, § 3.6(A)), requiring an annual report giving attention to changes in the West Midtown area and to any mitigating measures that might be needed for that area (par. 58). The complaint alleges that it is impossible to address the matter of mitigating measures "unless the carbon monoxide emissions ... and the effectiveness of mitigating measures on emissions reductions in past years can be computed or reported" (par. 59). It is alleged that the responsible agencies have failed to make the required computations and reports (pars. 60-61).

The sixth claim is entitled "*SIP evaluation of Project effect or emissions did not occur before Project approval.*" This claim is based upon two provisions of the SIP. The first states:

> The primary mechanism for comprehensive evaluation of major projects which may have a significant impact on air quality is the environmental impact statement (EIS). EIS's are required by either the National Environmental Policy Act (NEPA), the State Environmental Quality Review Act (SEQRA), or the New York City Environmental Quality Review (CEQR).

(p. 3-23, § 3.6) (comp. 63). The second is the provision referred to in the second claim to the effect that, if an EIS for a project proposal identifies a violation of the carbon monoxide standard, then the City commits to assure that mitigating measures will be implemented so as to provide for the attainment of that standard (p. 3-24, § 3.6(A)). It is alleged that an "SIP review" must occur before approval of the EIS (par. 64). The complaint indicates that the SIP review is the responsibility of the State Department of Environmental Conservation and the City Department of Environmental Protection (par. 68). The complaint alleges that, although the Project was approved by UDC on October 4, 1984, there was no review by either the DEC or the DEP until an inadequate review by the DEP on March 7, 1986 (par. 65).

In the prayer for relief, plaintiffs request a declaration that the planning for and approval of the Project has resulted in violations of the SIP; an injunction prohibiting defendants from proceeding further with the project; and a direction that the various defendants carry out their duties and responsibilities to enforce the SIP.

## Discussion

[2] An action under the citizen suit provision of the Clean Air Act must be based on an alleged violation of an "emission standard or limitation." 42 U.S.C. § 7604(a)(1)(A). The Act contains several definitions of "emission standard or limitation." The definition relied on by plaintiffs is:

> (3) ... any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements....

*Id.* at 7604(f). Thus, suit may be brought only for a violation of a condition or requirement, contained in an SIP, relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs, or vapor recovery requirements.

[3-5] An *air quality* standard established under the Clean Air Act is not an *emission* standard or limitation within the meaning of the citizen suit provision. *League to Save Lake Tahoe, Inc. v. Trounday*, 598 F.2d 1164, 1173 (9th Cir.), *cert. denied*, 444 U.S. 943, 100 S.Ct. 299, 62 L.Ed.2d 310 (1979). In order to sustain a citizen suit under the Act, a plaintiff must allege a violation of a specific strategy or commitment in the SIP and describe, with particularity, the respects in which compliance is deficient. *Council of Commuter Organizations v. Metropolitan Transportation Authority*, 683 F.2d 663, 670 (2d Cir.1982). The aims and goals of the SIP are not enforceable apart from the specific measures described in the SIP. *Action for Rational Transit v. West Side Highway*, 699 F.2d 614, 616 (2d Cir.1983).

*First Claim*

The essence of the first claim is that the SIP requires elimination of carbon monoxide hot spots by December 31, 1987 and that the Project will prevent this from being accomplished.

The reference in the complaint to the SIP requirement is to chapter 3 of the January 1984 SIP, dealing with carbon monoxide. The chapter discusses the National Ambient Air Quality Standards, including the carbon monoxide standard of 9 ppm maximum daily eight-hour average (p. 3-8, § 3.3). The SIP describes the fact that the Clean Air Act at one time required that the standards be met by the end of 1982, but that, for carbon monoxide, the Act allowed an extension until 1987 to reach the standard in certain hard-to-achieve areas, such as New York City. For these cases, a 1982 "SIP submittal" was required (p. 3-1, § 3.1). New York's January 1984 SIP refers to hot spots and defines them as locations which have been shown to have a potential to violate the standard as of December 1982 (p. 3-8, § 3.3). The SIP contains a list of "candidate" hot spots in New York City, including two in the project area, 8th Avenue between 40th and 42nd Streets and 42nd Street between 7th and 8th Avenues (p. 3-4, table 3-1). It also states that other hot spots which "may surface" will be addressed on a continuing basis (p. 1-6, § 1.3). As to the 1982 hot spots, the SIP sets out a schedule for their control and the attainment of the standard.

The SIP describes the control measures to be used. These are mainly transportation control measures and vehicle inspection and maintenance plans, which are two of the types of conditions or requirements listed in the citizen suit provision of the Clean Air Act. 42 U.S.C. § 7604(f).

The SIP states that both the 8th Avenue and 42nd Street hot spots will be eliminated at least by the end of 1987. The SIP asserts that, for New York City as a whole, control measures will be developed at a rate of at least 15 sites per year, and further states:

> It should be emphasized, however, that all hot spots will be eliminated by the end of 1987.

(p. 3-21, § 3.5.3). It is this statement which is referred to in the complaint as constituting the SIP condition or requirement which gives rise to the first claim.

[6] The first claim is legally deficient. It does not in fact allege a violation of the kind of condition or requirement which can give rise to a citizen suit under the Clean Air Act. The requirement that hot spots be eliminated by December 31, 1987 is in essence a restatement of the *air quality* standard established under the Act. It is not an *emission* standard. It is not a specific strategy or commitment as to how the air quality standard will be met. *See Commuter Organizations, supra*, 683 F.2d at 670. Finally, referring to the words of the statute, it is not a condition or requirement under the SIP relating to transportation control measures, or vehicle inspection and maintenance programs, or the other categories listed in the statute.

As already noted, in connection with carbon monoxide hot spots, the SIP does indeed contain certain conditions or requirements relating to transportation control measures and vehicle inspection and maintenace programs. However, the first claim makes no allegation of a violation in respect to these control measures.

The first claim is deficient for another reason. In alleging in a general way that the Project will prevent the elimination of

hot spots in the area, the first claim fails to take into account that the SIP provides a mechanism for dealing with such a problem. The SIP provides that environmental problems must be identified in the EIS, and that the City commits, where necessary, to mitigating measures so as to ensure compliance with the carbon monoxide standard.

Since the first claim fails to refer to this remedial mechanism provided for in the SIP, the claim simply fails to reach the relevant issue. However, the second and sixth claims *do* refer to these provisions of the SIP, and allege a violation thereof. We turn to these claims.

*Second and Sixth Claims*

These claims should be considered together because they both refer to the EIS procedure and the commitment of the City to mitigation. As described earlier, the SIP provides that the primary mechanism for evaluating a project's impact on air identifies a violation of the carbon monoxide standard, the City commits to assure that mitigating measures will be undertaken so as to meet that standard (p. 3-24, § 3.6(A)).

It is appropriate to deal first with the sixth claim. This claim alleges that the State Department of Environmental Conservation and the City Department of Environmental Protection had a duty to conduct a "SIP review" of the Project before its approval. It is alleged that UDC approved the Project on October 4, 1984 and that neither agency reviewed the EIS until the DEP conducted some review (allegedly inadequate) on March 7, 1986.

[7] The sixth claim states no valid cause of action. The complaint cites no requirement in the SIP that the DEC and the DEP, or either of these agencies, is required to make a "SIP review" of a project prior to the time that an entity such as the UDC approves it. The complaint refers to no provision of the SIP defining what is meant by "SIP review." The provision in the SIP relied on in the sixth claim states that the City commits, under certain circumstances, to assure mitigation of negative environmental

consequences of a project. However, this provision offers no basis for the allegations in the sixth claim.

This brings us to the second claim, which raises an alleged problem regarding the City's commitment.

It is necessary to pay close attention to the precise wording and meaning of the SIP provision involved and also to scrutinize closely what is alleged by way of violations of that SIP provision. The SIP provision reads:

> To further ensure that the carbon monoxide standard is attained in New York City, if an EIS for a project proposal identifies a violation or exacerbation of the carbon monoxide standard, then the City commits to assure that mitigating measures will be implemented by the project sponsor or City, so as to provide for the attainment of the standard by December 31, 1987 and maintenance of it thereafter.

(p. 3-24, § 3.6(A)). The complaint alleges (and this is apparently true) that there is a finding in the EIS that the effect of the Project will be to prevent the achievement of the carbon monoxide standard in the area without the implementation of mitigation measures (par. 38).

The complaint goes on to state that the SIP has been violated because the "City's commitment to mitigation measures" does not include measures which are effective to achieve the reduction in carbon monoxide emissions necessary to attain the air quality standard (par. 39).

As to the various groups of defendants, the complaint alleges that the State defendants – UDC, DEC, and certain officials of these entities – have violated the SIP "by failing to commit to, or seek the City's commitment to, the implementation of effective mitigation measures" (par. 40). The complaint alleges that the City defendants – the DEP and its commissioner, as well as the Mayor – have violated the SIP by permitting the Project to proceed despite a violation of the requirement "that a

commitment to the implementation of effective mitigation measures must be included in the Project" (pars. 41-42).

In viewing these various allegations, it must be kept in mind that the relevant SIP provision *contains the commitment* by the City with regard to necessary mitigation measures. The operative language is, "the City commits." There are no challenges to the concept that the SIP, being a plan adopted by the State of New York pursuant to federal statute, can validly contain a commitment on the part of an entity under the jurisdiction of the State—*i.e.*, the City of New York. Thus, as far as the record in this case shows, the SIP contains and constitutes the commitment by the City to assure the necessary mitigation measures.

[8] This means that the allegations (pars. 40-42) about various defendants failing to commit, or failing to seek the City's commitment, or failing to have a commitment included in the Project, are based on an incorrect premise—*i.e.*, that something else besides the SIP is needed to make the necessary commitment on the part of the City. These paragraphs state no valid claim.

In order to assert a legally sufficient claim for violation of this SIP provision, it would be necessary to allege a repudiation by the City of its commitment or a failure of the City to fulfill its commitment. Also, these allegations would need to be related to the specific items which can be the subject of a citizen suit under the Clean Air Act—*i.e.*, transportation-control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements. 42 U.S.C. § 7604(f). The allegations would need to be made with particularity. *Commuter Organizations, supra*, 683 F.2d at 670.

Paragraph 39 of the complaint is the only attempt at such an allegation. However, it is inadequate. It simply states in the most general manner that the City's commitment "does not include mitigation measures which are effective to achieve" the necessary air quality standard. There is no specific allegation of any particular act or omission of any kind on the part of the City. There is no allegation of any act or omission of the City in relation to the items specified in the citizen suit provision.

For these reasons, it must be concluded that none of the allegations in the second claim makes out a valid cause of action.

However, the parties have referred to certain matters outside the complaint in connection with the second claim. It is appropriate to deal with the issues thus raised. The UDC approval of the Project on October 4, 1984, referred to later in the complaint (par. 65), was accompanied by certain findings by UDC made pursuant to SEQRA, the New York statute dealing with the environmental impact statement process. The UDC findings and approval came after publication of the draft and the final EIS and public comments thereon.

In its findings of October 4, 1984 UDC noted that the Project would generate substantial additional traffic and congestion and that, without traffic mitigation, these circumstances would cause violations of the eight-hour carbon monoxide standard of 9 ppm at several locations in 1991 (UDC Findings pp. 22-23, 26). However, the UDC findings stated that mitigation measures had been incorporated into the project plan, as follows:

> To counter these impacts, a series of mitigation measures has been incorporated into the project plan. These measures, the impact of which has been quantitatively evaluated in the same manner as the mitigated traffic impacts discussed above, include (a) a new traffic lay-by lane on the east side of Eighth Avenue between 40th and 43rd Streets to provide standing and drop-off space for buses and taxis that now block the eastern lane of Eighth Avenue for this purpose; (b) a relocation of the Port Authority taxi stand on the west side of Eighth Avenue (combined with an appropriate no- standing restriction) to facilitate left turns onto westbound 42nd Street; (c) revised and effectively enforced no-standing regulations on Seventh Avenue between 41st and 45th Streets (or, alternatively, a partial re-routing of traffic from Seventh Avenue onto Broadway between 45th and 41st Streets); (d) revised signal timing and no-standing regulations on 42nd Street to facilitate through traffic and right turns

> onto both Eighth Avenue for westbound vehicles and Seventh Avenue for eastbound vehicles; (e) additional enforcement of the foregoing measures by City traffic control agents, for whom space will be provided within the project area; and (f) revised signal timing on 43rd Street to improve crosstown flows.

UDC Findings p. 23. UDC found that, with these mitigation measures, there would be no violation of the 9 ppm carbon monoxide standard (p. 26).

On November 9, 1984 the New York City Board of Estimate adopted the UDC's findings and approved the project.

The Board of Estimate referred to the environmental findings of UDC, and UDC's incorporation of mitigation measures, in the preamble to the resolution:

> WHEREAS, on October 4, 1984, UDC found (i) that all requirements of the State Environmental Quality Review Act ("SEQRA") applicable to the Project have been met and satisfied, (ii) that consistent with social, economic and other essential considerations from among the reasonable alternatives thereto, the Project is one which minimizes or avoids adverse environmental effects to the maximum extent practicable, including the effects disclosed in the final environmental impact statement, and (iii) that consistent with social, economic and other essential considerations, *to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided by incorporating as conditions to the Project those mitigative measures which were identified as practicable;* . . . (emphasis added)

The Board then resolved:

> (2) RESOLVED, That the Board of Estimate, having considered the matters referred to in the UDC Findings, concurs in and adopts the UDC Findings; . . .

In their memorandum on the present motion, plaintiffs contend that, even if UDC's mitigation measures are adequate, developments since the time of the UDC and Board of Estimate approvals "strongly suggest that the City in fact has no plans to carry out the mitigation methods" adopted by UDC (Memorandum of August 29, 1986 p. 22). The sole support for this contention is plaintiffs' assertion that the City's Department of Transportation has announced that it is considering certain actions with respect to traffic on 42nd Street, specifically the possibility of making it a one-way street. Such a step would be inconsistent with item (d) of UDC's mitigation plan, which would revise certain signals and traffic regulations to facilitate turns from 42nd Street onto both Seventh Avenue and Eighth Avenue. This phase of the UDC plan contemplates two-way traffic on 42nd Street. Plaintiffs assert that the City is now considering one-way traffic for 42nd Street.

In connection with this argument of plaintiffs, it must be borne in mind that the City's commitment in the SIP is generally to assure *whatever* mitigation is necessary to comply with the air quality standard. The SIP does not commit the City to any particular set of mitigation measures. Under the terms of the SIP, the City is not frozen into adhering to the details of the UDC plan. The Board of Estimate's approval of the UDC plan is certainly consistent with the City's obligation to assure mitigation, and this runs counter to any claim that the City is failing to honor its mitigation commitment. However, there is nothing to bar the Department of Transportation from considering alternative traffic measures. Nothing in the record indicates that the consideration of one-way traffic on 42nd Street amounts to a repudiation of the City's commitment to mitigation or threatens nonperformance of that commitment.

With regard to the mitigation measures adopted by UDC, plaintiffs' memorandum contends, although not strongly, that these measures are ineffective (Memorandum p. 23 n. 18). This argument is foreclosed by a state court ruling.

Certain of the plaintiffs in the present case brought an Article 78 proceeding in the state court to review, among other things,

UDC's analysis of the Project's impact on traffic and air quality in the EIS and UDC's findings and approval of the Project. The trial court dismissed these claims. The Appellate Division and the Court of Appeals affirmed this ruling. *Jackson v. N.Y. State Urban Development Corp.*, 110 A.D.2d 304, 494 N.Y.S.2d 700 (1st Dept.1985); *aff'd*, 67 N.Y.2d 400, 503 N.Y.S.2d 298, 494 N.E.2d 429 (1986). The Appellate Division noted that UDC had "proposed extensive mitigative measures to minimize those adverse [traffic] impacts and to meet the Federal Clean Air Act's standard for acceptable carbon monoxide levels." 110 A.D.2d at 311, 494 N.Y.S.2d at 704. The court held that UDC had a reasonable basis to conclude that the mitigative measures "would in fact minimize those adverse effects." *Id.* The Court of Appeals expressly approved and affirmed this holding. 67 N.Y.2d 426, 503 N.Y.S.2d at 311, 494 N.E.2d at 442. Plaintiffs are barred from re-litigating the adequacy of the UDC mitigation measures, since the issue was decided in the *Jackson* case.

*Third Claim*

The provision of the SIP relied on in the third claim was quoted earlier, but will be restated. The SIP provides that the State DEC

> will compute, for each pollutant, emission reductions achieved during the calendar year through implementation of control measures on permitted sources, area sources, and mobile sources. Actual reductions thus calculated will be compared with those predicted in the SIP. Shortfalls, if any, will be discussed as to their effect on RFP [Reasonable Further Progress] in future years.
>
> * * * * * *
>
> A summary of emission reductions resulting from control measures and other influencing factors will be prepared and a graphical comparison made between the growth and control line and the RFP line included in the SIP.

(p. 1-10, § 1.6). These computations and summaries are to be included in an annual report furnished by the DEC to the EPA by July 1 of the year following the year covered by the report. *Id.*

The complaint notes that in May 1979 SIP there was a series of graphs showing a comparison of certain data about carbon monoxide emissions over a period of time with the so-called RFP line regardind such emissions (May 1979 SIP, p. III-19 *et seq.*) (comp. par . 45). One of these graphs was for Midtown Manhattan. The presentations were in terms of tons per day of emissions for the area covered by the particular graph. It is alleged that trends regarding carbon monoxide emissions are needed for a rational assessment of the impact of the Project and of necessary mitigation (par. 45).

The complaint alleges that the DEC has not computed or reported carbon monoxide emissions reductions for Manhattan or for Midtown Manhattan for the year 1984 or the year 1985 (pars. 47-49).

At a conference with counsel held on May 11, 1987, the court requested a further specification of what is complained of in the third claim. It now appears that plaintiffs concede that reports were filed by the DEC with the EPA pertaining to the years 1984 and 1985. For the year 1984 there may have been a draft report followed by a final report responding to EPA criticisms. In any event, reports for the years in question have been filed. What is complained about is as follows: *First*, plaintiffs assert that neither of the reports contains the kind of graphs included in the May 1979 SIP, and allegedly contemplated in the language of the January 1984 SIP quoted above. *Second*, the emissions reductions are not shown for each separate control measure.

With respect to the second point, plaintiffs simply misconstrue the SIP. It would seem clear that there is no requirement that separate calculations be made for each individual controll measure. It is patently impossible to determine separately what emission reductions result from changing parking rules, from traffic signal changes, etc.

With regard to the graphs, defendants concede that the 1984 and 1985 reports do not contain the kind of graphs displayed in the May 1979 SIP. However, defendants argue that, with regard to carbon monoxide, it has become apparent that the meaningful measuring process relates to specific locations, because carbon monoxide generally involves localized problems and is addressed by localized measures. Indeed, the relevant localities are often particular streets or particular blocks. Thus, according to defendants, the graphs about tons per day of emissions relating to large areas, presented in the May 1979 SIP, have been found not to be meaningful, and the method of reporting in the 1984 and 1985 annual reports has been adjusted to take account of these realities, all of which has the concurrence of the EPA.

What has just been discussed has been set forth, not in order to make factual findings on these issues, but to throw light on the legal issue which will now be addressed. The basic question regarding the third claim, as with the other claims, is whether plaintiffs state a valid cause of action for violation of a condition or requirement of the SIP in relation to any of the four subjects referred to in the statute—*i.e.*, transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery programs.

[9] There is no doubt that the reporting requirements of the SIP are a most important feature of the SIP. However, at no place in plaintiffs' amended complaint, in their memorandum, or at oral argument do plaintiffs attempt to allege that the reporting requirements referred to in the third claim fall within any of the four statutory subjects. The court concludes that the kind of reporting of data about emissions, which is the subject of plaintiffs' objections, is not a condition or requirement relating to transportation control measures or any of the other statutory categories.

It should be borne in mind that the third claim , as now defined by plaintiffs, deals with the technical refinements as to the kind of data which should be included in the reports. This is a question that can well be left to the expertise of the EPA.

*Fourth Claim*

As summarized earlier, the fourth claim complains about the alleged lack of "special attention" in the annual report to new developments in the West Midtown area. It also alleges that the various defendants did not require production of adequate materials for the Project's EIS, which would then be the basis for the analysis in the annual report.

[10] There are various deficiencies in the fourth claim. In the first place, there is no specification of which annual report is referred to. Also, as in the case of the third claim, plaintiffs make no contention or argument that this reporting requirement is a condition or a requirement relating to any of the subjects referred to in the citizen suit provision of the Clean Air Act, and the court holds that it does not. Finally, insofar as the fourth claim attacks the sufficiency of the EIS and the material obtained in connection therewith, this allegation is barred by the State court action. *See Jackson, supra*, 67 N.Y.2d 400, 503 N.Y.S.2d 298, 494 N.E.2d 429, *affirming*, 110 A.D.2d 304, 494 NY.S.2d 700.

*Fifth Claim*

This is another claim alleging failure to comply with the SIP requirements for the annual report. It is alleged that there has been a failure to give "special attention" to mitigating measures necessary for the West Midtown area.

[11] As in the case of the preceding claims, plaintiffs have failed to allege or argue that this claim comes within the citizen suit provision of the Clean Air Act, and the court holds that it does not. To the extent that it raises an issue about mitigation measures for the Project, the matter is dealt with by the provision of the SIP committing the City to the necessary mitigation.

*Notice Requirement*

[12] The Clean Air Act specifies that a plaintiff must give 60 day's notice to the EPA of alleged violations of a SIP before bringing a citizen suit. 42 U.S.C. § 7604(b). This notice provision is

to be construed flexibly and realistically to carry out the purpose of having the EPA investigate and act upon an alleged violation. *Friends of the Earth v. Carey*, 535 F.2d 165, 175 (2d Cir.1976), *cert. denied*, 434 U.S. 902, 98 S.Ct. 296, 54 L.Ed.2d 188 (1977); *see also Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 84 n. 4 (2d Cir.1975)

[13] In the present case plaintiffs did not give the EPA notice of all the items alleged in the amended complaint prior to the submission of that complaint. However, in mid-July 1986 the proposed amended complaint was circulated to all parties who were named as defendants in the action, including the EPA. Obviously, many months have elapsed since that time. There has been ample opportunity for the EPA to take action regarding the alleged violations of the SIP. A realistic application of the notice requirement in this case would not be achieved by rejecting the complaint for the technical failure to give a notice separate from the complaint. It is in the interest of justice to deal with the complaint on the merits.

## Conclusion

For the foregoing reasons, plaintiffs' motion to file and serve the amended complaint is denied. There is no indication that the deficiencies in plaintiffs' claims can be cured by further amendment. Leave to replead is not granted. The action is dismissed.

SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| STEPHEN F. WILDER, BRENDAN GILL, IMRE J. ROSENTHAL, STEPHEN ROSENTHAL, ROBERT NEUWIRTH, LORI JEAN SAIGH, and the WHITBY TENANTS' ASSOCIATION, Plaintiffs, against LEE M. THOMAS, as Administrator of the United States Environmental Protection Agency, et al., Defendants. | 85 CIVIL 8356 (TPG) JUDGMENT |

Plaintiffs having moved to file and serve the amended complaint and the said motion having come before the Honorable THOMAS P. GRIESA, U.S.D.J., and the Court thereafter on May 13, 1987, having handed down its opinion (#60977); denying plaintiffs' motion to file and serve the amended complaint and denying leave to replead; dismissing the action, it is,

ORDERED, ADJUDGED AND DECREED: That the action be and it is hereby dismissed.

DATED: NEW YORK, NEW YORK
May 20, 1987

/s/ Raymond F. Burghardt
Clerk

DOCUMENT No. 31

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 5-21-87.

## CLEAN AIR ACT PROVISIONS

1. **Section 110 of the Clean Air Act, as amended, 42 U.S.C. § 7410:**

**State implementation plans for national primary and secondary ambient air quality standards**

**(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems**

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) except as may be provided in subparagraph (I)(i) in the case of a plan implementing national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as required in parts C and D of this subchapter and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national ambient air quality standards are achieved and

maintained, and (ii) a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 7426 of this title, relating to interstate pollution abatement;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; (v) for authority comparable to that in section 7603 of this title, and adequate contingency plans to implement such authority; and (vi) requirements that the State comply with the requirements respecting State boards under section 7428 of this title;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor

vehicles to enforce compliance with applicable emission standards;

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements or to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977;

(I) it provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 7501(2) of this title) to which such plan applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of part D of this subchapter (relating to nonattainment areas);

(J) it meets the requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection); and

(K) it requires the owner or operator of each major stationary source to pay to the permitting authority

as a condition of any permit required under this chapter a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, whether before or after August 7, 1977, the reasonable costs (incurred after such date) of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action).

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C.A. § 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e) of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

(D) Any applicable implementation plan for which an attainment date later than December 31, 1982, is provided pursuant to section 7502(a)(2) of this title shall be revised by July 1, 1979, to include the comprehensive measures and requirements referred to in subsection (c)(5)(B) of this section.

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 7411 of this title will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of

approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect

source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program".

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d) of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

**(b) Extension of period for submission of plans**

The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

**(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation**

(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

> (A) the State fails to submit an implementation plan which meets the requirements of this section,
>
> (B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or
>
> (C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance wtih the requirements of this section. Notwithstanding the preceding sentence, any portion of a plan relating to any measure described in the first sentence of section 7421 of this title (relating to consultation) or the consultation process required under such section 7421 of this title shall not be required to be promulgated before the date eight months after such date required for submission.

(2)(A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign

Commerce of the United States House of Representatives and the Committee on Environment and Public Works of the United States Senate not later than three months after June 22, 1974, on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Secretary of Energy, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under

this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph —

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) In the case of any applicable implementation plan containing measures requiring—

(A) retrofits on other than commercially owned in-use vehicles,

(B) gas rationing which the Administrator finds would have seriously disruptive and widespread economic or social effects, or

(C) the reduction of the supply of on-street parking spaces,

the Governor of the State may, after notice and opportunity for public hearing, temporarily suspend such measures notwithstanding the requirements of this section until January 1, 1979, or the date on which a plan revision under subsection (a)(2)(I) of this section is submitted, whichever is earlier. No such suspension shall be granted unless the State agrees to prepare, adopt, and submit such plan revision as determined by the Administrator.

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by

the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures (including the written evidence required by part D of this subchapter), to:

> (i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and
>
> (ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

**(d) Applicable implementation plan**

For purposes of this chapter, an applicable implementation plan is the implementation plan, or most recent revision thereof,

which has been approved under subsection (a) of this section or promulgated under subsection (c) of this section and which implements the requirements of this section.

**(e) Extension of time period for attainment of national primary ambient air quality standard in implementation plan; procedure; approval of extension by Administrator**

(1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a)(2)(A)(i) of this section for not more than two years for an air quality control region if after review of such plan the Administrator determines that –

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit complaince within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for –

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

**(f) National or regional energy emergencies; determination by President**

(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that –

(A) a temporary suspension of any part of the applicable implementation plan may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that –

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title, as in effect before August 7, 1977, or section 7413(d) of this title, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

**(g) Governor's authority to issue temporary emergency suspensions**

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines—

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within the required four month period, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title as in effect before August 7, 1977, or under section 7413(d) of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

**(h) Annual publication of comprehensive document for each State setting forth requirements of applicable implementation plan**

(1) Not later than one year after August 7, 1977, and annually thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents. Each such document shall be revised as frequently as practicable but not less often than annually.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

**(i) Modification of requirements prohibited**

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

**(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards**

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used will enable such source to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(July 14, 1955, c. 360, Title I, § 110, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1680, and amended June 22, 1974, Pub.L. 93-319, § 4, 88 Stat. 256; S.Res. 4, Feb. 4, 1977; Aug. 4, 1977, Pub.L. 95-91, Title III, § 301(a), Title VII, § 703, 91 Stat. 577, 606; Aug. 7, 1977, Pub. L. 95-95, Title I, §§ 107, 108, 91 Stat. 691, 693; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(1)-(6), 91 Stat. 1399; July 17, 1981, Pub.L. 97-23, § 3, 95 Stat. 142.)

2. Section 304 of the Clean Air Act, as amended, 42 U.S.C. §7604:

**Citizen suits**

**(a) Authority to bring civil action; jurisdiction**

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

**(b) Notice**

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.[1]

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(c)(1)(B) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

**(c) Venue; Intervention by Administrator**

(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervent as a matter of right.

**(d) Award of costs; security**

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nonrestriction of other rights

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from –

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.

(f) Definition

For purposes of this section, the term "emission standard or limitation under this chapter" means –

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or

(3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment), any condition or requirement of section 7413(d) of this title (relating to certain enforcement orders), section 7419 of this title (relating to primary nonferrous

> smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, section 7545(e) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visibility protection), any condition or requirement under part B of subchapter I of this chapter (relating to ozone protection), or any requirement under section 7411 or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise.[1]

which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.

(July 14, 1955, c. 360, Title III, § 304, as added Dec. 31, 1970, Pub.L. 91-604, § 12(a), 84 Stat. 1706, and amended Aug. 7, 1977, Pub.L. 95-95, Title III, § 303(a)-(c), 91 Stat. 771, 772; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(77), (78), 91 Stat. 1404.)

[1] So in original. Probably should be a comma.

New York State Environmental Quality Review Act, N.Y. Envtl. Conserv. Law §8-0109 (McKinney 1984 and 1988 Supp.):

Preparation of environmental impact statement

1. Agencies shall use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process.

2. All agencies (or applicant as hereinafter provided) shall prepare, or cause to be prepared by contract or otherwise an environmental impact statement on any action they propose or approve which may have a significant effect on the environment. Such a statement shall include a detailed statement setting forth the following:

(a) a description of the proposed action and its environmental setting;

(b) the environmental impact of the proposed action including short-term and long-term effects;

(c) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(d) alternatives to the proposed action;

(e) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

(f) mitigation measures proposed to minimize the environmental impact;

(g) the growth-inducing aspects of the proposed action, where applicable and significant;

(h) effects of the proposed action on the use and conservation of energy resources, where applicable and significant; and

(i) such other information consistent with the purposes of this article as may be prescribed in guidelines issued by the commissioner pursuant to section 8-0113 of this chapter.

Such a statement shall also include copies or a summary of the substantive comments received by the agency pursuant to subdivision four of this section, and the agency response to such comments. The purpose of an environmental impact statement is to provide detailed information about the effect which a proposed action is likely to have on the environment, to list ways in which any adverse effects of such an action might be minimized, and to suggest alternatives to such an action so as to form the basis for a decision whether or not to undertake or approve such action. Such statement should be clearly written in a concise manner capable of being read and understood by the public, should deal with the specific significant environmental impacts which can be reasonably anticipated and should not contain more detail than is appropriate considering the nature and magnitude of the proposed action and the significance of its potential impacts.

3. An agency may require an applicant to submit an environmental report to assist the agency in carrying out its responsibilities, including the initial determination and (where the applicant does not prepare the environmental impact statement), the preparation of an environmental impact statement under this article. The agency may request such other information from an applicant necessary for the review of environmental impacts. Notwithstanding any use of outside resources or work, agencies shall make their own independent judgment of the scope, contents and adequacy of an environmental impact statement.

4. As early as possible in the formulation of a proposal for an action, the responsible agency shall make an initial determination whether an environmental impact statement need be prepared for the action. When an action is to be carried out or approved by two or more agencies, such determination shall be made as early as possible after the designation of the lead agency.

With respect to actions involving the issuance to an applicant of a permit or other entitlement, the agency shall notify the applicant in writing of its initial determination specifying therein the basis for such determination. Notice of the initial determination along with appropriate supporting findings on agency actions shall be kept on file in the main office of the agency for public inspection.

If the agency determines that such statement is required, the agency or the applicant at its option shall prepare or cause to be prepared a draft environmental impact statement. If the applicant does not exercise the option to prepare such statement, the agency shall prepare it, cause it to be prepared, or terminate its review of the proposed action. Such statement shall describe the proposed action and reasonable alternatives to the action, and briefly discuss, on the basis of information then available, the remaining items required to be submitted by subdivision two of this section. The purpose of a draft environmental statement is to relate environmental considerations to the inception of the planning process, to inform the public and other public agencies as early as possible about proposed actions that may significantly affect the quality of the environment, and to solicit comments which will assist the agency in the decision making process in determining the environmental consequences of the proposed action. The draft statement should resemble in form and content the environmental impact statement to be prepared after comments have been received and considered pursuant to subdivision two of this section; however, the length and detail of the draft environmental statement will necessarily reflect the preliminary nature of the proposal and the early stage at which it is prepared.

The draft statement shall be filed with the department or other designated agencies and shall be circulated to federal, state, regional and local agencies having an interest in the proposed action and to interested members of the public for comment, as may be prescribed by the commissioner pursuant to section 8-0113.

5. After the filing of a draft environmental impact statement the agency shall determine whether or not to conduct a public hearing on the environmental impact of the proposed action. If the agency determines to hold such a hearing, it shall commence the hearing within sixty days of the filing and unless the proposed action is withdrawn from consideration shall prepare the environmental impact statement within forty-five days after the close of the hearing, except as otherwise provided. The need for such a hearing shall be determined in accordance with procedures adopted by the agency pursuant to section 8-0113 of this article. If no hearing is held, the agency shall prepare and make available the environmental impact statement within sixty days after the filing of the draft, except as otherwise provided.

Notwithstanding the specified time periods established by this article, an agency shall vary the times so established herein for preparation, review and public hearings to coordinate the environmental review process with other procedures relating to review and approval of an action. An application for a permit or authorization for an action upon which a draft environmental impact statement is determined to be required shall not be complete until such draft statement has been filed and accepted by the agency as satisfactory with respect to scope, content and adequacy for purposes of paragraph four of this section. Commencing upon such acceptance, the environmental impact statement process shall run concurrently with other procedures relating to the review and approval of the action so long as reasonable time is provided for preparation, review and public hearings with respect to the draft environmental impact statement.

6. To the extent as may be prescribed by the commissioner pursuant to section 8-0113, the environmental impact statement prepared pursuant to subdivision two of this section together with the comments of public and federal agencies and members of the public, shall be filed with the commissioner and made available to the public prior to acting on the proposal which is the subject of the environmental impact statement.

7. a. An agency may charge a fee to an applicant in order to recover the costs incurred in preparing or causing to be

prepared or reviewing a draft environmental impact statement or an environmental impact statement on the action which the applicant requests from the agency; provided, however, that an applicant may not be charged a separate fee for both the preparation and review of such statements. The technical services of the department may be made available on a fee basis reflecting the costs thereof, to a requesting agency, which fee or fees may appropriately be charged by the agency to the applicant under rules and regulations to be issued under section 8-0113.

b. Such rules and regulations shall require the applicant to reimburse the conservation fund, as established pursuant to subdivision (a) of section eighty-three of the state finance law, in order to recover all costs incurred in preparing or causing to be prepared or reviewing a draft environmental impact statement or an environmental impact statement by employees of the department, whose salary and expenses are paid, in whole or in part, from the conservation fund.

8. When an agency decides to carry out or approve an action which has been the subject of an environmental impact statement, it shall make an explicit finding that the requirements of this section have been met and that consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided.

(Added L.1975, c. 612, § 1; amended L.1977, c. 252, § 3.)

## NEW YORK STATE AIR QUALITY IMPLEMENTATION PLAN FOR CONTROL OF CARBON MONOXIDE AND HYDROCARBONS IN NEW YORK CITY METROPOLITAN AREA

### Section 3.6 CO FACTORS

There are four major factors, each with their own degree of uncertainty, which can affect the results of the CO SIP. The four factors are:

- Growth
- Changing traffic patterns
- Conservativeness of method
- Accuracy of data

These factors are discussed below.

To deal with the uncertainties of these factors, NYSDEC will prepare an Annual Report (as described in greater detail in Chapter 1) which will monitor the progress of the SIP. One of the primary objectives of the Annual Report is to review and ensure that the emission reductions are being achieved. Also, new projects will be evaluated. Based on the Annual Reports findings, the SIP will be revised to reflect any significant change of the factors.

*Growth*

Every attempt was made to account for future growth (normal growth in the vehicle population) at the hot spot locations. Typically most of the candidate hot spots were identified due to the chronic traffic congestion at these locations. It is evident that these sites generally operate at or near capacity during their peak hour. This factor itself places a limitation on any future growth that a given area can absorb.

Both the IMM and Verification procedures predict a one hour carbon monoxide concentration at a site. The eight hour worst case carbon monoxide concentration is determined by multiplying the one hour concentration using a persistency factor of 0.7.

The persistency factor accounts for the physical phenomenon that concentrations directly downwind from a source (point or line) decrease due to increased meander of wind direction over time. All other parameters are assumed to remain constant (including emissions) over the eight hours.

*Changing Traffic Patterns*

Current traffic patterns along a given roadway can undergo significant future change due to such factors as the construction of major traffic generators, the elimination of major traffic generators or simply a major improvement in the roadway. Examples of major traffic generators include such facilities as convention centers, sporting arenas, shopping centers, large apartment complexes, etc. The construction or demolition of such facilities can alter the traffic patterns on the roadways contiguous to the facility.

It is important that the impact of changing traffic patterns on air quality be accounted for and evaluated. The primary mechanism for comprehensive evaluation of major projects which may have a significant impact on air quality is the environmental impact statement (EIS). EIS's are required by either the National Environmental Policy Act (NEPA), the State Environmental Quality Review Act (SEQRA), or the New York City Environmental Quality Review (CEQR).

The State Environmental Quality Review Act (SEQRA) requires that every State and local agency assess the environmental impacts of proposed projects subject to the statute prior to undertaking actions or issuing approvals. Projects, subject to SEQR, that may be classified as indirect sources of air pollution must be evaluated for present and future contributions to air pollution. Indirect source means a facility, structure of installation the construction or operation of which results or may result directly or indirectly in associated vehicular movements which contribute to ambient concentrations of any air contaminant for which there is an ambient air quality standard. The SEQRA applies to all state and local agencies. Local municipalities may adopt an environmental quality review

ordinance which can be no less restrictive than the State law; for example, New York City's CEQR.

Areas in New York State exist where carbon monoxide standards are not met (nonattainment areas) or where an increase in emissions would jeopardize maintenance of them. This is particularly true in the New York City Metropolitan Area. Implementation of SEQRA has varied to some degree between municipalities. These variables legitimately exist as a result of communities differing concerns with regard to their environment, economy and/or social factors. Some of these indirect source activities have the potential to degrade existing air quality in nonattainment areas to a point where public health may be adversely affected. Consequently, the New York State Department of Environmental Conservation (DEC) is proposing to assist local governments in the Outer Counties in implementing indirect source review within CO nonattainment areas. In return, DEC expects these local governments to use the air quality review process in its decision-making regarding the granting, denying or conditioning of permits for projects which are identified as indirect sources of air contamination.

In order to ensure that the carbon monoxide standard will be attained by December 31, 1987, and maintained thereafter, NYSDEC will not issue permits for proposed projects including indirect sources for which the EIS identifies that the project will cause a violation or exacarbation of the standard, unless State or local government requires that the necessary steps will be taken to prevent the identified violations. As to specific nonattainment areas, the following activities shall be adhered to:

A. New York City

To further ensure that the carbon monoxide standard is attained in New York City, if an EIS for a project proposal identifies a violation or exacarbation of the carbon monoxide standard, then the City commits to assure that mitigating measures will be implemented by the project sponsor or City, so as to provide for attainment of the standard by December 31, 1987 and maintenance of it thereafter.

The State and City will report to EPA on an annual basis confirming that commitments to implement mitigating measures by the City are proceeding according to schedule and reporting any significant changes from conditions anticipated in the SIP. Furthermore, the State and City will develop and implement any additional mitigating measures that might be necessary to provide for attainment and maintenance if conditions (e.g., traffic, land use) anticipated in the SIP change significantly. The State and City recognize that new projects in "West Midtown" and vicinity are expected to result in growth and changed traffic patterns in the area. Consequently, the annual report will give special attention to significant changes in the West Midtown area and to any mitigating measures that might be necessary for that area.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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STEPHEN F. WILDER, BRENDAN GILL, IMRE J. ROSENTHAL, STEPHEN ROSENTHAL, ROBERT NEUWIRTH, LORI JEAN SAIGH, and the WHITBY TENANTS' ASSOCIATION,

Plaintiffs,

v.

LEE M. THOMAS, as Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; REGION II of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; NEW YORK STATE URBAN DEVELOPMENT CORPORATION; VINCENT TESE, as Chairman of the New York State Urban Development Corporation; TIMES SQUARE REDEVELOPMENT CORPORATION; ROBERT M. HALL, as President of the Times Square Redevelopment Corporation; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; HENRY G. WILLIAMS, as Commissioner of the New York State Department of Environmental Conservation; DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK; HARVEY W. SCHULTZ, as Commissioner of the Department of Environmental Protection; MARIO M. CUOMO, as Governor of the State of New York; and EDWARD I. KOCH, as Mayor of the City of New York,

Defendants.

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85 Civ. 8356 (TPG)
AMENDED COMPLAINT

Plaintiffs, by their undersigned attorneys, complain and allege as follows:

## JURISDICTION

1. This is a citizens' suit brought (a) to require certain defendants to carry out their duties to enforce the Clean Air Act, 42 U.S.C. §§7401 *et seq.* (the "Act"), and the New York State Implementation Plan, 40 C.F.R. §§52.1670-52.1689 (the "SIP"), promulgated pursuant to the Act; and (b) to enjoin certain defendants, preliminarily and permanently, from proceeding with the proposed 42nd Street Development Project (the "Project") on the ground that the Project, as planned and implemented for construction, has caused or will cause violations of conditions or requirements of the SIP, and, through such SIP violations, of the Act. The Court has jurisdiction of this action pursuant to 42 U.S.C. §7604(a) and 28 U.S.C. §1331.

2. Venue is proper in the Southern District of New York because all plaintiffs reside or work therein; all defendants maintain offices therein; the proposed Project is planned to be built therein; and the sources of the emissions into the air caused by the Project and by the failure to enforce the Act are located therein.

## PARTIES

3. Plaintiff Stephen F. Wilder is a resident of Manhattan who lives in a building at 888 Eighth Avenue in close proximity to the area of the proposed Project. He is a past chairman of the New York City Group of the Sierra Club and is the chairman of the Permanent Citizens Advisory Committee to the Metropolitan Transit Authority.

4. Plaintiff Brendan Gill is an author and critic who works at 25 West 43rd Street in Manhattan, in close proximity to the area of the proposed Project.

5. Plaintiffs Imre J. Rosenthal and Stephen Rosenthal are residents of Manhattan who work at 1451 Broadway, within the area of the proposed Project.

6. Plaintiffs Robert Neuwirth and Lori Jean Saigh are residents of Manhattan who live in the neighborhood of Clinton which is adjacent to the Project.

7. Plaintiff Whitby Tenants' Association (the "Association") is an organized group of the majority of tenants of a multiple dwelling building at 325 West 45th Street. The building is located in close proximity to the Project area. The Association was established in June, 1979.

8. The individual plaintiffs and the Association's members live or work in or around the Project area. Plaintiffs have standing to bring this lawsuit because these individuals and the Association's members will be injured in their health and their enjoyment of the Project area if the Project is built and results in violations of the SIP as alleged below.

9. Defendant United States Environmental Protection Agency ("EPA") is an agency of the United States that has the duty to enforce the provisions of the Act and of applicable state implementation plans, including the New York SIP. Defendant Lee M. Thomas is Administrator of defendant EPA and, in that capacity, has the duty to ensure that EPA carries out its responsibilities to enforce the Act and applicable SIPs.

10. Defendant Region II of the United States Environmental Protection Agency ("Region II") is responsible for enforcing the provisions of the Act and applicable SIPs for Region II, the geographical region that includes New York City.

11. Defendant New York State Urban Development Corporation ("UDC") is a corporate governmental agency of the State of New York created by the Urban Development Corporation Act ("UDC Act"), McKinney's Unconsolidated Laws, §§6251-6285. Defendant UDC has planned the proposed Project and intends to construct the Project through its subsidiary, defendant Times Square Redevelopment Corporation. Defendant UDC also is responsible for the activities of the New York Convention Center Development Corporation, another UDC subsidiary, which has constructed and is operating the Jacob

Javits Convention Center, a project in Manhattan near the Project area. Defendant Vincent Tese is Chairman of the UDC and responsible for directing its operations and activities.

12. Defendant Times Square Redevelopment Corporation ("TSRC") is a subsidiary of UDC created pursuant to §6262 of the UDC Act for the purpose of constructing the proposed Project. Defendant Robert M. Hall is president of the TSRC and responsible for directing its operations and activities.

13. Defendant New York State Department of Environmental Conservation ("DEC") is an agency of the State of New York that has the duty to ensure that New York State and its agencies comply with applicable emissions standards and limitations established pursuant to the Act and applicable SIPs. Defendant Henry G. Williams is the Commissioner of the DEC and, in that capacity, has the duty to ensure that the DEC carries out its responsibilities under the Act and the New York SIP.

14. Defendant Mario M. Cuomo is Governor of the State of New York and, in that capacity, has the duty to ensure that his appointees, defendants Tese, Hall and Williams, and the agencies of the State, including the UDC, TSRC and the DEC, carry out their responsibilities under the Act and the SIP.

15. Defendant New York City Department of Environmental Protection ("DEP") is an agency of the City of New York that has the duty to ensure compliance with the Act and applicable SIP in New York City. Defendant Harvey W. Schultz is Commissioner of the DEP and, in that capacity, has the duty to ensure that DEP carries out its responsibilities under the Act and the SIP.

16. Defendant Edward I. Koch is Mayor of the City of New York and, in that capacity, has the responsibility to ensure that defendants Schultz and the DEP, and other agencies of the City of New York, carry out their responsibilities under the Act and the SIP.

## BACKGROUND COMMON TO ALL CLAIMS FOR RELIEF

*The Project*

17. Defendant UDC, in cooperation with defendant Koch and agencies of the City of New York, has prepared and adopted a plan for the proposed Project which covers a thirteen acre site located north and south of 42nd Street between Broadway and Eighth Avenues in Manhattan. The Project, which will be executed by defendant TSRC, will include the construction of four large new office towers, ranging in height from 29 to 56 stories and totalling 2.1 million square feet of office space; a new hotel; and a new "merchandise mart" containing 2.4 million square feet of space on the two blocks of Eighth Avenue across from the Port Authority Bus Terminal. This Project, if built, will fundamentally change the character of the West Midtown area of Manhattan increasing the overall level of commercial activity, and the level of vehicular traffic.

18. Construction of the Project will result in more intensive commercial use of the Project area. Thousands of additional office workers and visitors will be drawn into the area during the day by the Project's new buildings. These changes will be accompanied by significant increases in the level of emissions-producing traffic in the Project area. It is well-established that vehicular traffic is the principal source of emissions of carbon monoxide, an air contaminant regulated under the Act.

19. Pursuant to the requirements of the State Environmental Quality Review Act, the UDC prepared an Environmental Impact Statement ("EIS") which addressed traffic, air pollution and other environmental impacts of the Project.

20. Significant changes have occurred or are planned in the West Midtown area, including the Project, the UDC's new Javits Convention Center, and the rerouting of traffic on 42nd Street and other midtown cross-streets that is needed to transport visitors for the Convention Center. The projects, together with revised City zoning regulations that encourage development of

the West Midtown, will lead to further significant changes in the development of West Midtown.

*The Clean Air Act and the Citizens' Suit Provisions*

21. The Act requires the EPA to promulgate national primary ambient air quality standards for carbon monoxide. 42 U.S.C. §7409(a). The national primary ambient air quality standard for carbon monoxide, established pursuant to the Act, provides that concentrations of carbon monoxide in the air shall not exceed a level of nine parts per million ("ppm"), over an eight-hour period, more than once a year, on or after December 31, 1987. 40 C.F.R. §50.8; 42 U.S.C. §7502(a)(2).

22. Each state is required by the Act to adopt a state implementation plan, or "SIP", "which provides for implementation, maintenance and enforcement" of the air quality standards established pursuant to the Act. 42 U.S.C. §7410(a)(1). The SIP must include "emissions limitations, schedules and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance" of the Act's ambient air quality standards. 42 U.S.C. §7410(a)(2)(B).

23. On June 17, 1985, EPA approved the most recent group of New York SIP submissions for control of carbon monoxide in the New York City metropolitan area. (50 Fed. Reg. 25078). The SIP submissions so approved were first proposed, in part, in 1982; and revisions were prepared in January, 1984 (the "January, 1984 SIP") and submitted by the defendants Cuomo and DEC to EPA in early February, 1984.

24. The Act provides that

> any person may commence a civil action on his own behalf . . . (1) against any person . . . who is alleged to be in violation of (A) an emission standard or limitation under this chapter [the Act] . . .

42 U.S.C. §7604(a)(1).

An "emission standard or limitation under this chapter" is defined in 42 U.S.C. §7604(f) for purposes of the citizen's suit provisions to include "any condition or requirement under an applicable implementation plan [SIP] relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery programs. . . ." Thus, a citizens' suit may be maintained for violation of certain "conditions or requirements" of the New York SIP related to carbon monoxide.

25. No action may be commenced under 42 U.S.C. §7604(a)(1) until 60 days after notice of the violations complained of has been given to EPA and others, pursuant to 42 U.S.C. §7604(b)(1)(A). On February 8, 1985, plaintiffs' attorneys served notice on defendants DEC, Williams, EPA, Koch, Cuomo, Region II, UDC, TSRC, DEP, Schultz (through his predecessor at DEP), and Thomas, by certified letter, of the violations set forth in this Complaint and of their intention to file suit thereon. A copy of the notice letter is attached as Exhibit A hereto.

**FIRST CLAIM FOR RELIEF**
**(Failure to eliminate carbon monoxide "hot spots" caused by the Project by 1987)**

26. Plaintiffs repeat and reallege the allegations of Paragraphs 1 to 25 hereof.

27. A carbon monoxide "hot spot" is defined as "any location which has been shown to have a potential to violate" air quality standards for carbon monoxide as of December, 1982 (January, 1984 SIP, pg. 3-8, §3.3); "hot spot" locations can extend to other nearby areas (January, 1984 SIP, pg. 3-8, §3.3); and new "hot spots " can be located by measurement or computation as conditions change or data improve (January, 1984 SIP, pg. 1-6, §1.3, pg. 3-8, §3.3). Carbon monoxide "hot spots" are identified in the SIP in the Project vicinity (see January, 1984 SIP, pg. 3-4, Table 3-1, Items 10, 11).

28. It is a condition or requirement of the SIP to commit the State to an "ongoing process of identifying and analyzing

carbon monoxide hot spots" (January, 1984 SIP, pg. 1-5, §1.3) and to eliminate all carbon monoxide "hot spots" by December 31, 1987 (January, 1984 SIP, pg. 3-21, §3.5.3).

29. Carbon monoxide "hot spots", existing and new, will continue to be found in the Project area, after December 31, 1987:

(a) During construction of the proposed Project;

(b) After completion of the Project, because mitigation measures proposed by defendant UDC for the Project are not effective to reduce carbon monoxide emissions and eliminate "hot spots" in the Project area; and

(c) After completion of the Project, as predicted by defendant DEP's computations.

30. Construction and completion of the Project will assure the continued existence of "hot spots" in the Project area after 1987. This condition violates the requirement of the SIP that all carbon monoxide "hot spots" be eliminated by December 31, 1987.

31. Defendants UDC, TSRC, Tese and Hall have violated the SIP condition or requirement that carbon monoxide "hot spots" be eliminated by the end of 1987 by permitting the planning for the Project to proceed despite the predicted continued existence of these "hot spots."

32. Defendants Williams and DEC have violated the SIP "hot spot" elimination requirement by permitting the Project to proceed despite the fact that the SIP has been violated.

33. Defendant Cuomo has violated the SIP requirement for "hot spot" elimination by failing to require his appointees Hall, Tese and Williams to adhere to the SIP requirements.

34. Defendants Schultz and DEP have violated the SIP by permitting the Project to go forward despite defendant DEP's computed prediction that the SIP "hot spot" elimination requirement will be violated.

35. Defendant Koch has violated the SIP requirement for "hot spot" elimination by failing to require his appointee Schultz to adhere to the SIP requirements.

**SECOND CLAIM FOR RELIEF**
**(Failure to require Project air pollution mitigation measures to be effective)**

36. Plaintiffs repeat and reallege the allegations of Paragraphs 1 to 25 and Paragraphs 27 to 35 hereof.

37. It is a condition or requirement of the SIP

> To further ensure that the carbon monoxide standard is attained in New York City, if an EIS for a project proposal identifies a violation or exacerbation of the carbon monoxide standard, then the City commits to assure that mitigating measures will be implemented by the project sponsor or City [of New York], so as to provide for attainment of the standard by December 31, 1987 and maintenance of it thereafter.

(January, 1984 SIP, pg. 3-24, §3.6(A)).

38. The UDC's environmental impact statement for the Project states that the 1987 carbon monoxide level committed to in the SIP (January, 1984 SIP, pgs. 1-1, 3-1 §§1.1, 3.1) cannot be met without effective mitigation measures.

39. The SIP has been violated because the City's commitment to mitigation measures to be implemented by the UDC or the City for the Project does not include mitigation measures which are effective to achieve the reduction in carbon monoxide emissions necessary to attain the carbon monoxide standard by December 31, 1987, and maintain it thereafter.

40. Defendants DEC, UDC and TSRC, Hall and Tese have violated the SIP by failing to commit to, or seek the City's commitment to, the implementation of effective mitigation measures for the Project which would prevent violation of, and assure maintenance of, the carbon monoxide standards after December 31, 1987.

41. Defendants Schultz and DEP have violated the SIP by permitting the Project to proceed despite the violation of the SIP requirement that a commitment to the implementation of effective mitigation measures must be included in the Project.

42. Defendant Koch has violated the SIP requirement that a commitment to the implementation of effective mitigation measures be included in the Project by failing to require his appointee Schultz to adhere to this SIP requirement.

**THIRD CLAIM FOR RELIEF**
**(Failure to compute carbon monoxide emission reductions in prior years for Midtown Manhattan)**

43. Plaintiffs repeat and reallege the allegations of Paragraphs 1 to 25, Paragraphs 27 to 35 and Paragraphs 37 to 42 hereof.

44. It is a condition or requirement of the SIP that the defendant DEC

> will compute, for each pollutant [including carbon monoxide], emission reductions achieved during the calendar year through implementation of control measures on permitted sources, area source, and mobile sources. Actual reductions thus calculated will be compared with those predicted in the SIP. Shortfalls, if any, will be discussed as to their effect on RFP [Reasonable Future Progress] in future years.
>
> * * *
>
> A summary of emission reductions resulting from control measures and other influencing factors will be prepared and a graphical comparison made between the growth and control line and the RFP line included in the SIP.

(January, 1984 SIP, pg. 1-10, §1.6). These computations and summaries are due by July 1 of each year. (*Id.*)

45. The SIP requires that the carbon monoxide emissions reduction be reported for the entire metropolitan area with

respect to the Reasonable Further Progress ("RFP") line in the SIP (January, 1984 SIP, pg. 1-10, §1.6; May 1, 1979 SIP, Figs. 3-1, 3-2, 3-3), with a separate RFP line and emissions reduction report for midtown Manhattan, the location of the Project area (Fig. 3-1). Knowledge of these reductions in carbon monoxide emissions is needed for rational assessment of the impact of the Project on future carbon monoxide levels in the Project area and for evaluation of the effectiveness of carbon monoxide emissions mitigation measures proposed for the Project.

46. Upon information and belief, the responsibility for computing, summarizing and reporting carbon monoxide reductions for the City of New York has been delegated by defendant DEC to defendant DEP.

47. Upon information and belief, neither the DEP nor the DEC has computed or reported carbon monoxide emissions reductions for Manhattan or for midtown Manhattan for 1984, as was required by July 1, 1985.

48. Upon information and belief, neither the DEP nor the DEC has computed or reported carbon monoxide emissions reductions for Manhattan or for midtown Manhattan for 1985, as was required by July 1, 1986.

49. Defendants DEP, DEC, Schultz and Williams have violated the SIP by failing to compute or report, for 1984 and 1985, carbon monoxide emissions reductions as required by the SIP.

**FOURTH CLAIM FOR RELIEF**
**(Failure to address Project interaction with other changes in West Midtown)**

50. Plaintiffs repeat and reallege the allegations of Paragraphs 1 to 25, Paragraphs 27 to 35, Paragraphs 37 to 42, and Paragraphs 44 to 49 hereof.

51. It is a condition or requirement of the SIP that

> The State and City recognize that new projects in "West Midtown" [Manhattan] and vicinity are

> expected to result in growth and changed traffic patterns in the area. Consequently, the annual report will give *special attention to significant changes in the West Midtown area* and to any mitigating measures that might be necessary for that area. (emphasis added).

(January, 1984 SIP, pg. 3-25, §3.6). The SIP requires that the effect of traffic patterns on air quality be evaluated. (January, 1984 SIP, pg. 3-23, §3.6). The SIP also requires that the environmental impact statement for new projects be used to provide underlying information for the annual report (January, 1984 SIP, pgs. 3-23, 3-24, §3.6).

52. The SIP requirement that the annual report provide "special attention to significant changes in the West Midtown area and to any mitigating measures that might be necessary for that area" (January, 1984 SIP, pg. 3-25, §3.6(A)) has been violated, because, on information and belief, there has been no adequate assessment of future air quality in the West Midtown area which includes the Project, the Javits Center, other planned projects, and traffic interactions among the projects.

53. Defendants DEC, DEP, Williams and Schultz violated the SIP by not requiring the production of materials in the EIS for the Project or otherwise so that the significant changes in the West Midtown area could receive the special attention in the annual report which the SIP requires. (January, 1984 SIP, pg. 3-25, §3.6).

54. Defendants UDC, TSRC, Tese and Hall have violated the SIP because the EIS for the Project did not account for the interactions between the Project, the Javits Center and the changing traffic flow patterns occasioned by the Center so that significant changes in the West Midtown area could receive the special attention in the annual report which the SIP requires.

55. Defendant Cuomo violated the SIP by failing to assure, through his appointees, that significant changes in the West Midtown area had been described realistically, consistent with the SIP requirement that special attention be paid to West Midtown in the annual report.

56. Defendant Koch violated the SIP by failing to require the City agencies, which jointly sponsored the Project with the UDC (the Public Development Corporation and the Department of City Planning), to assure that the Project and the other significant changes in the West Midtown area receive the special attention in the annual report required by the SIP.

**FIFTH CLAIM FOR RELIEF**
**(Effectiveness of carbon monoxide mitigation measures for Project not determinable)**

57. Plaintiffs repeat and reallege the allegations of Paragraphs 1 to 25, Paragraphs 27 to 35, Paragraphs 37 to 42, Paragraphs 44 to 49 and Paragraphs 51 to 56.

58. It is a condition or requirement of the SIP that

> the annual report [to be submitted annually by July 1 by defendant DEC] will give special attention to significant changes in the West Midtown area and to any *mitigating measures* that might be necessary for that area. (emphasis added).

(January, 1984 SIP, pg. 3-25, §3.6(A)).

59. It is impossible to provide the "special attention" required by the SIP to "any mitigating measures that might be necessary for [the West Midtown] area" unless the carbon monoxide emissions levels in past years and the effectiveness of mitigating measures on emissions reductions in past years can be computed or reported.

60. Upon information and belief, neither defendant DEC nor defendant DEP has computed or reported the emission reductions resulting from mitigation and control measures for the New York metropolitan area, or for the Midtown area. This is contrary to the requirements of the SIP (January, 1984 SIP, pg. 1-10, §1.6; May 1, 1979 SIP, Figs. 3-1, 3-2, 3-3).

61. Defendants DEP, DEC, Schultz and Williams have violated the SIP by failing to provide the computations and reports on emissions reductions required by the SIP and needed

to determine the necessity for carbon monoxide emissions mitigating measures for the Project and in West Midtown.

**SIXTH CLAIM FOR RELIEF**
**(SIP evaluation of Project effect or emissions did not occur before Project approval)**

62. Plaintiffs repeat and reallege the allegations of Paragraphs 1 to 25, Paragraphs 27 to 35, Paragraphs 37 to 42, Paragraphs 44 to 49, Paragraphs 51 to 56 and Paragraphs 58 to 61.

63. It is a condition or requirement of the SIP that new projects be evaluated through the environmental impact statement process. The SIP requires

> The primary mechanism for comprehensive evaluation of major projects which may have a significant impact on air quality is the environmental impact statement (EIS). EIS's are required by either the National Environmental Policy Act (NEPA), the State Environmental Quality Review Act (SEQRA), or the New York City Environmental Quality Review (CEQR).

(January, 1984 SIP, pgs. 3-23 and 3-24, §3.6).

64. For the City of New York, it is a condition or requirement of the SIP that

> To further ensure that the carbon monoxide standard is attained in New York City, if an EIS for a project *proposal* identifies a violation or exacerbation of the carbon monoxide standard, then the City commits to assure that mitigating measures will be implemented by the project sponsor or City, so as to provide for attainment of the standard by December 31, 1987 and maintenance of it thereafter. (emphasis added).

(January, 1984 SIP, pg. 3-24, §3.6).

Under this SIP section, the SIP review for a project to be built in the City must occur before approval of the "EIS for a project

proposal" in order to assure that the carbon monoxide standard is attained and that the necessary and most appropriate mitigation measures are implemented.

65. The Project was approved by defendants UDC and TSRC on October 4, 1984. Upon information and belief, the EIS for the Project was reviewed under the SIP by defendant DEP no earlier than March 7, 1986.

66. On March 14, 1986 counsel for defendant UDC stated, at a hearing before this Court, that the SIP review of the Project EIS contained errors and might be revised. (*See* Transcript of March 14, 1986 hearing on 85 Civ. 8356, pgs. 12, 13).

67. Upon information and belief, the initial review of the Project EIS was incorrect and no corrected review of the Project EIS has been submitted to Region II or EPA.

68. Defendants DEP and DEC violated the SIP by not reviewing the Project EIS, under the SIP, prior to Project approval by defendant UDC, the sponsor of the Project.

69. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs respectfully request that the Court enter judgment:

A. Declaring that the planning for and approval of construction of the proposed Project has resulted in violations of the SIP;

B. Enjoining defendants UDC, TSRC, Cuomo, Tese and Hall, preliminarily and permanently, from planning for, and proceeding with, construction of the Project;

C. Directing the defendants DEC, DEP, Schultz and Williams to carry out their duties and responsibilities to enforce the SIP;

D. Awarding plaintiffs the costs and disbursements of this action, together with their reasonable attorneys fees and expert

witness fees, as provided by law, and such other and further relief as the Court deems just and proper.

Dated: New York, New York
July 16, 1986

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## EXHIBIT A TO AMENDED COMPLAINT

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February 8, 1985

Regional Administrator
United States Environmental Protection Agency
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New York, New York 10007

Henry G. Williams, Commissioner
New York State Department of
Environmental Conservation
50 Wolf Road
Albany, New York 12233

*Re: 42nd Street Development Project-*
*Notice of Intent to File Suit for*
*Violations of the Clean Air Act*

Sirs:

We are writing on behalf of the individuals listed at the end of this letter, pursuant to the citizen's suit notice provisions of the Clean Air Act, 42 U.S.C. §7604(b)(1)(A) and the regulations promulgated thereunder, 40 C.F.R. Part 54. We hereby notify you that we intend, on behalf of those listed and potentially, others, to commence a civil action against your agencies and

against some, or all, of the organizations and individuals set forth in the service list at the end of this letter.

We intend to sue you and some, or all, of the others named in order to enforce the carbon monoxide ambient air quality standards which the Clean Air Act, 42 U.S.C. §7401 *et seq.* (the "Act"), requires the State of New York to attain pursuant to the New York State Implementation Plan ("SIP"), 40 C.F.R. §§52.1670 to 52.1689, and its included Transportation Control Plan. The Act requires that, by 1987, the carbon monoxide ambient levels in any given area not exceed 9 parts per million over an eight hour period more than once a year.

As a non-attainment area for carbon monoxide, currently in violation of carbon monoxide ambient air quality standards, metropolitan New York is statutorily required to make "reasonable further progress" each year toward attainment of the 1987 standard (42 U.S.C. §7502(b)(3); SIP, pages III-4, III-5). It is clear, however, that construction of the 42nd Street Development Project (the "Project"), which the New York State Urban Development Corporation ("UDC") has sponsored with the City of New York, and which the City's Board of Estimate has formally approved, will make attainment of the required carbon monoxide emission levels in that area impossible before the 1987 deadline for compliance has passed.

The 42nd Street Project will make "reasonable further progress" toward compliance with the carbon monoxide ambient standards impossible because building the Project will create conditions which exacerbate existing levels of emissions rather than helping to achieve the progressive carbon monoxide reductions depicted in Figure 3-1 (SIP, page III-19) as necessary if the standard is to be met. Moreover, the so-called mitigation measures which are proposed to lower carbon monoxide emissions in the Project area are clearly inadequate to bring the area into compliance with federal standards by the legally required date.

The violations of the Act for which we seek enforcement and abatement are acknowledged in the Final Environmental Impact Statement ("FEIS") which the UDC itself developed for

the Project. The FEIS admits that the 42nd Street area is in violation of ambient air quality standards. This is the case despite the fact that the FEIS fails to incorporate data and computations from the most recent New York SIP revision of January 1984 (the FEIS was published in August 1984). That SIP revision identifies five intersections in the vicinity of the Project as predicted "hot spot" areas (January 1984 SIP, Table 3-1, page 3-4) with especially high carbon monoxide levels. The hot spots include 42nd Street between 7th and 8th Avenues, the very spine of the Project, as well as 8th Avenue between 40th and 42nd Streets.

Despite its failure to take note of this newest information in the SIP revision, the FEIS does include data which demonstrate, first of all, that at the present time at several locations within the Project area, "where traffic volumes are high and speeds relatively low, eight-hour violations [of carbon monoxide ambient air quality standards] are currently experienced under adverse meteorological conditions. . . " (FEIS, page 2-336). The FEIS reaches this conclusion despite its failure to utilize worst case analysis of conditions, which is necessary in an FEIS to properly establish an upper bound of pollution impact. In its own calculations, the FEIS uses a lower-than-maximum hourly traffic volume figure and a higher-than-approved traffic speed figure for computing auto emissions in the 42nd Street area; it nonetheless discloses that carbon monoxide levels often exceed the 9 parts per million ambient standard at the present time.

Second, the FEIS concedes that greater congestion due to slowed traffic during the construction of the Project will increase carbon monoxide emissions in the area (FEIS, page 3-20). Studies cited in the FEIS show that by 1988, in mid-construction, there will be several locations in the Project area at which carbon monoxide levels exceed 9.0 parts per million, even with mitigation (FEIS, page 3-21; Tables 3-4, 3-5 attached). Thus, the existing violation of ambient air quality standards will be exacerbated during the building phase, well past the 1987 deadline for compliance with the 9 parts per million standard.

Next, the FEIS concedes that, without mitigation, violations of the 8-hour Clean Air Act standard for carbon monoxide will occur at several receptor locations within the Project area after completion of the Project (FEIS, page 5-34) and that, consequently, "conditions would be considerably worse with the project" (FEIS, page 2-345). The FEIS acknowledges that, when operational, the merchandise mart, hotel and four large office towers planned for the Project will result in "[i]ncreased vehicular traffic generated by the project [which] will increase mobile emissions and consequently increase pollutant levels." (FEIS, page 2-340). Such a result directly contradicts the mandate of the SIP to "reduce vehicular traffic in the hub area" (SIP, page V-21) and hence to achieve the necessary progressive reductions in emissions.

In addition, pollution in the vicinity of the Project will be even worse than the FEIS admits, for an assortment of reasons. First, the FEIS omits to mention that the Project will intensify the continuing redevelopment of the West Side, which will increase traffic, and thus carbon monoxide emissions, in that area. In fact, in the FEIS the UDC neglects to assess the impact upon traffic in the Project area of the construction of its own project, the Javits Convention Center, which will include an associated 2000-car garage.

Moreover, the statistical calculations of the FEIS which predict air pollution outcomes contain numerous analytical inaccuracies, including, among others, the use of invalid modeling techniques by utilizing a superseded EPA model, MOBILE-2, which underestimates the magnitude of vehicular emissions by as much as three times; the use of improperly low persistence factors to calculate 8-hour carbon monoxide levels; the consistent underreporting of present and future peak traffic volumes (such as the failure to consider that the office uses of new buildings will generate more travel by taxi); the overstatement of travel speeds; and the overestimation of the number and impact of emissions-controlled vehicles and diesel-fueled trucks in the future. The cumulative impact of these errors is that the FEIS' conclusions as to air quality impacts from the Project are underestimated and misleading. Had the UDC employed a true

worst case traffic analysis, its data would show expected 1991, post-Project carbon monoxide levels about 35 to 50 percent above those reported in the FEIS, and hence well above levels permissible under the Clean Air Act.

In fact, Region II of the Environmental Protection Agency ("EPA") identified some of these errors to the responsible agencies during the review process for the Project; yet they remained uncorrected in the final EIS. (*See*, e.g., Comment No. 218 from the U.S. Environmental Protection Agency, FEIS, pages 10-148 to 149; and the attached letter from Richard Walka of the EPA to the UDC dated November 14, 1984, noting that the FEIS fails to address several of the above-listed concerns). Despite that fact that these errors were not corrected, however, Region II of the EPA has failed to take steps to halt the Project.

Nor will the so-called "mitigating measures" which the FEIS proposes for conforming ambient air quality levels to the 1987 standards be effective to achieve the required degree of control of air contamination. Since the Project area contains a carbon monoxide "hot spot" in a non-attainment area, it is necessary to "provide for the implementation of all reasonably available control measures as expeditiously as possible" to reduce emissions in order to meet the 1987 standard. (42 U.S.C. §7502(b)(2)). The New York SIP, as approved in 1979, advised the use of strategies such as parking restrictions and restrictions on vehicle use as control measures, noting of the last that it "should lead to sizable reductions in vehicle emissions and could be a good method of dealing with hot spots" (SIP, page V-90). Yet plans for the Project have proceeded without even serious consideration being given to the implementation of special mitigation strategies for this particularly contaminated area. The mitigation measures proposed consist almost entirely of an increase in traffic enforcement agents, despite the fact that budgetary constraints may make it impossible to utilize as many agents as proposed. In fact, the Project makes no provision for additional funds to supply these agents, even though the State is required to provide the financial and manpower resources necessary to carry out the directive of the New York SIP. (1979 SIP, page V-24; 42 U.S.C. §7502(b)(7)). More importantly, the

effectiveness of these traffic control strategies in reducing carbon monoxide emissions has not yet been demonstrated at any location in New York City. The recommendation of the EPA that there be pre- and post-construction monitoring of the Project site to determine the effectiveness of any mitigation measures which are implemented has been rejected (*See* FEIS, pages 10-148 to 149); despite this, the Project has been permitted to move forward.

Finally, our calculations, based on the data provided in the FEIS, demonstrate that the UDC will be unable to obtain the indirect source permit required by Part 203, Title 6 of the *Official Compilation of Codes, Rules and Regulations of the State of New York* ("NYCRR"), before construction can begin on the Project. The indirect source permit may only be granted if the additional traffic generated by the construction of a facility will not result in a violation of air quality standards or will not exacerbate an existing violation. However, construction of the Project will violate both prohibitions if it proceeds without additional study and the formulation of more effective mitigation measures.

Another air contaminant will be increased in the Project area if the Project proceeds as planned. The FEIS acknowledges that the Project will generate increased truck and bus traffic, but predicts, based on the assumption that the vehicles will operate on diesel fuel, that carbon monoxide emissions from those vehicles will be reduced in the future. However, the FEIS fails to discuss the fact that diesel fuel combustion produces pollution in the form of fine particulate emissions. Thus, one means for controlling carbon monoxide levels which is relied upon in the FEIS produces increased levels of fine particulates. The FEIS neither quantifies the increase in the level of the fine particulate emissions which can be expected nor addresses the potential health hazard which such fine particulates can constitute.

Your agencies are apparently prepared to allow construction of this Project to proceed, in violation of your duties pursuant to the Clean Air Act, even though this Project will exacerbate already-existing violations in a non-attainment area and will

result in post-1987 violations of carbon monoxide ambient air quality standards. Accordingly, we are prepared to seek injunctive relief against commencement of the Project, as we are authorized to do by the Clean Air Act, unless, within 60 days from the date you receive this letter, you take action to prevent implementation of the Project until effective strategies are developed to offset, to the lawfully required degree, the emissions which will be generated.

Only by so doing will you comply with your duties under the SIP and the Act.

Very truly yours,

LeBoeuf, Lamb, Leiby & MacRae
/s/ Jacob Friedlander
by Jacob Friedlander

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NEW YORK STATE URBAN DEVELOPMENT CORPORATION

Findings With Respect to
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New York, New York

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PART V
REVIEW PROCEDURES

C. ENVIRONMENTAL IMPACTS OF THE PROJECT

2. *Project Impacts*

f. *Air Quality*

Increased vehicular traffic generated by the Project will increase mobile source emissions and, as a result, pollutant levels.

In 1991, maximum predicted one-hour carbon monoxide concentrations will be below the one-hour standard of 35 ppm at all project area receptor locations. However, without traffic mitigations, violations of the eight-hour carbon monoxide standard of 9 ppm would occur at several locations in 1991 under peak traffic and adverse meteorological conditions. In addition, increased carbon monoxide concentrations due to the Project would, absent mitigation, substantially exceed *de minimis* criteria, that have historically been used to define significant air quality impacts, and would therefore have a significant impact on air quality.

With mitigation, these impacts are reduced substantially. For the 320 parking space alternative, there are no predicted violations of the 9 ppm eight-hour carbon monoxide standard in 1991. For the 920 parking space alternative, there is only on location (40th Street between Seventh and Eighth Avenues, a feeder street to the proposed garage) where there would be a carbon monoxide concentration (amount to a 9.3 ppm) exceeding 9 ppm. Moreover, with mitigation, carbon monoxide concentrations with the Project would (with the exception of Broadway between 42nd

and 43rd Streets) be within accepted *de minimis* criteria and consequently would not have a significant impact on air quality. At the Broadway location, the increase in concentrations would exceed *de minimis* criteria, though the concentrations themselves will be below the 9 ppm ambient air quality standard. With mitigation, carbon monoxide concentrations with the Project will be lower at Seventh and Eighth Avenues than would be the case without the Project.

The Project will have no significant effect on regional pollutant burdens. Similarly, since the major new buildings within the project area are expected to be heated and cooled with steam from the Consolidated Edison system, increases in stationary source emissions will be minimal, and no significant air quality impacts are anticipated from these sources.

## D. IMPACTS DURING PROJECT CONSTRUCTION

### 2. *Traffic and Air Quality Impacts*

A quantitative analysis of both traffic and air quality impacts resulting from increased traffic congestion during the construction period indicates that, in 1988 (when the first office building, the theaters, mart and hotel will be complete but when construction activities at the remaining office sites and, possibly, the Times Square subway station will be continuing), in the absence of a construction phase mitigation program, traffic congestion will be severe. This problem will be particularly acute on matinee days, on 42nd Street and Seventh and Eighth Avenues as a result of the new traffic generated by the Project combined with utility relocations, subway renovation and office building construction activities planned for the eastern and western ends of the project area. In air quality terms, this congestion will, unless mitigated, result in predicted violations of the 9 ppm carbon monoxide standard along a number of project area streets and avenues.

### 3. *Mitigation Measures*

To remedy these traffic congestion and air quality problems, a number of mitigation measures are proposed. These include

most of the measures previously described above under "Traffic and Transportation Impacts," including the lay-by lane on Eighth Avenue (which will be completed by 1988) and light-timing modifications combined with no-standing restrictions on 42nd Street. On Seventh Avenue, however, due to the on-going construction of the office buildings and reconstruction of the Times Square subway station, a temporary diversion of some southbound traffic from Seventh Avenue to Broadway will be implemented between 45th and 41st Streets. In addition, rigorous enforcement of no standing regulations will be required on Seventh Avenue between 42nd and 41st Streets.

With the measures described above, traffic should move adequately during the construction period, though there will undoubtedly be periods when congestion will be severe, particularly in the immediate vicinity of 42nd Street and Seventh Avenue. In terms of air quality, for the 320 space alternative, there is only one location (Broadway near 42nd Street) where eight-hour carbon monoxide concentrations are predicted to exceed 9 ppm in 1988. These concentrations are the result of the temporary traffic diversion described above. Once that diversion is ended, the Broadway readings, even under worst case meteorological conditions, should not exceed 9 ppm. Under the 920 space alternative, eight-hour concentrations would exceed 9 ppm on both Broadway and 40th Street, though the 40th Street concentrations would be within *de minimis* criteria as compared to concentrations without the project.

## PART III

## FINDINGS PURSUANT TO THE STATE ENVIRONMENTAL QUALITY REVIEW ACT

Based on the foregoing and having fully considered the FEIS and considered, determined and found the matters set forth above, UDC hereby (*a*) finds that all requirements of SEQRA and Part 617 have been met in the preparation and consideration of the FEIS and (*b*) makes the following additional findings:

(1) consistent with the social, economic and other essential considerations, from among the reasonable alternatives thereto, the action to be approved is one which minimizes or avoids adverse environmental effects to the maximum extent practicable, including the effects disclosed in the Final Environmental Impact Statement; and

(2) consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided by incorporating as conditions to the decision those mitigating measures which were identified as practicable.

No. 88-1103

Supreme Court, U.S.
FILED
FEB 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

STEPHEN F. WILDER, BRENDAN GILL, IMRE J. ROSENTHAL, STEPHEN ROSENTHAL, ROBERT NEUWIRTH, LORI JEAN SAIGH, and the WHITBY TENANTS' ASSOCIATION,

*Petitioners,*

v.

LEE M. THOMAS, as Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; REGION II of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; NEW YORK STATE URBAN DEVELOPMENT CORPORATION; VINCENT TESE, as Chairman of the New York State Urban Development Corporation; TIMES SQUARE REDEVELOPMENT CORPORATION; ROBERT M. HALL, as President of the Times Square Redevelopment Corporation; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; HENRY G. WILLIAMS, as Commissioner of the New York State Department of Environmental Conservation; DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK; HARVEY W. SCHULTZ, as Commissioner of the Department of Environmental Protection of the City of New York; MARIO M. CUOMO, as Governor of the State of New York; and EDWARD I. KOCH, as Mayor of the City of New York,

*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Statement Pursuant to Rule 28.1

A. New York State Urban Development Corporation

Non-Wholly owned subsidiaries:

1. Apollo Theatre Redevelopment Corporation -
   Parent Companies: New York State Urban Development Corporation and Harlem Urban Development Corporation.

2. New York Convention Center Development Corporation -
   Parent Companies: New York State Urban Development Corporation and Triborough Bridge and Tunnel Authority.

3. New York State Mortgage Loan Enforcement and Administration Corporation -
   Parent Companies: New York State Urban Development Corporation and New York State Project Finance Agency.

B. Times Square Redevelopment Corporation

Parent Company: New York State Urban Development Corporation (Note: the Times Square Redevelopment Corporation was dissolved on September 29, 1986).

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Jackson v. New York State Urban Development Corporation, 110 A.D.2d 304, 494 N.Y.S.2d 700 (1st Dep't 1985), aff'd, 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1980). . . passim

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

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No. 88-1103

---

STEPHEN F. WILDER, BRENDAN GILL, IMRE J. ROSENTHAL, STEPHEN ROSENTHAL, ROBERT NEUWIRTH, LORI JEAN SAIGH, and the WHITBY TENANTS' ASSOCIATION,

Petitioners,

v.

LEE M. THOMAS, as Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; REGION II of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; NEW YORK STATE URBAN DEVELOPMENT CORPORATION; TIMES SQUARE REDEVELOPMENT CORPORATION; ROBERT M. HALL, as President of the Times Square Redevelopment Corporation; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; HENRY G. WILLIAMS, as Commissioner of the New York State Department of Environmental Conservation; DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK; HARVEY W. SCHULTZ, as Commissioner of

the Department of Environmental Protection of the City of New York; MARIO M. CUOMO, as Governor of the State of New York; and EDWARD I. KOCH, as Mayor of the City of New York,

Respondents.

---

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## STATEMENT OF THE CASE

This brief is submitted on behalf of the New York State Urban Development Corporation, the Times Square Redevelopment Corporation, and Robert M. Hall (collectively, "UDC"); all other New York State respondents; and the New York City respondents (collectively, the "respondents") in opposition to the petition of Stephen F. Wilder et al. (the "petitioners") for a writ of certiorari to the United States Court of Appeals for the Second Circuit (the

"Petition"). The petitioners seek review of the portion of the Second Circuit's opinion and judgment in Wilder v. Thomas, 854 F.2d 605 (2d Cir. 1988) (PA 1-30)[1], that precluded them from relitigating under the Clean Air Act (the "CAA"), 42 U.S.C. §§ 7401 et seq., issues that had already been fully and fairly addressed in state administrative proceedings pursuant to New York's State Environmental Quality Review Act ("SEQRA"), N.Y. Envtl. Conserv. L. §§ 8-0101 et seq., and three levels of state court review.

In the only part of the decision contested by the petitioners, the Second

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[1]"PA __" identifies citations to the Appendix attached to the Petition. "RA__" refers to the Appendix submitted by the respondents and attached to this brief. The corresponding pages of the Joint Appendix submitted to the Second Circuit in this case are identified by "[JA __]" in the respondents' Appendix.

Circuit merely applied New York's established doctrine of collateral estoppel to the specific facts of this case to dispose of three of the petitioners' six claims. The holding of the case is therefore narrowly confined to the facts presented below. Because the Second Circuit's opinion presents no conflict with either the decisions and policies of this Court or decisions of other federal courts of appeals, this Court should deny the petition for a writ of certiorari.

A. Environmental Review and Approval of the Project

This case is one of 41 lawsuits that "seek to forestall construction of the proposed 42nd Street Development Project ("the [P]roject") in New York City." Wilder v. Thomas, 854 F.2d at 607

(PA 1-2).[2] The Project, a joint effort by UDC and the City of New York, includes construction of four major office buildings, a hotel, a wholesale mart, restaurants, retail spaces, and ancillary parking facilities; renovation of eight historic theaters; and modernization of the Times Square subway station. The goals of the Project are to eliminate the blight, physical decay, and crime that characterize West 42nd Street and to restore the area as an economically

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[2]Every lawsuit decided to date has either been dismissed or resolved in favor of the Project. In two prior cases decided by the Second Circuit, the plaintiffs (including some of the petitioners in this action) also sought review by this Court. In both instances, the petitions for writs of certiorari were denied. See Rosenthal & Rosenthal v. New York State Urban Development Corp., 605 F. Supp. 612 (S.D.N.Y.), aff'd, 771 F.2d 44 (2d Cir. 1985), cert. denied, 475 U.S. 1018 (1986); G&A Books, Inc. v. Stern, 604 F. Supp. 898 (S.D.N.Y. 1985), aff'd, 770 F.2d 288 (2d Cir.), cert. denied, 475 U.S. 1015 (1986).

productive entertainment and commercial center. See Jackson v. New York State Urban Development Corporation, 67 N.Y.2d 400, 411-12, 494 N.E.2d 429, 503 N.Y.S.2d 298, 301-02 (1986).

Before approving the Project, UDC was required to comply with several New York statutes, including SEQRA. Pursuant to SEQRA, UDC issued a draft environmental impact statement ("DEIS") in February 1984. Thereafter, extensive public hearings were conducted, and written comments on the DEIS were received and reviewed. See Jackson, 67 N.Y.2d at 412, 494 N.E.2d 429, 503 N.Y.S.2d at 302. Based on these 240 written and oral public submissions, UDC revised the Project's overall environmental analysis and issued a final environmental impact statement ("FEIS") containing more than 1,000 pages of text, tables, figures,

and illustrations. See id. Although not required by SEQRA to do so, UDC solicited written comments on the FEIS as well. See id.

The FEIS focused heavily on the Project's traffic and air quality impacts. In particular, it described in detail the methodology employed in predicting impacts of the Project on carbon monoxide concentrations in the Project area. UDC assumed "worst case" traffic and air quality conditions for this analysis, which was carried out for two separate parking scenarios (one with 320 parking spaces in the Project and the other with 920 spaces). See RA 23. In carrying out this air quality analysis, UDC compared the Project's anticipated "worst case" impacts both against expected carbon monoxide concentrations in the absence of the Project

and against the national ambient air quality standards ("NAAQS") for carbon monoxide established by the federal Environmental Protection Agency ("EPA") pursuant to the CAA.[3] The FEIS concluded that, provided UDC approved an extensive series of transportation-related measures designed to mitigate traffic and air quality impacts of the Project, the Project with 320 parking spaces would not cause any violation of the 9 ppm NAAQS for carbon monoxide. See RA 2-3, 5-10.

UDC's Directors, to whom the FEIS and the comments thereon were submitted for review, incorporated the recommended

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[3]For the purposes of this dispute, the relevant NAAQS for carbon monoxide, as established by EPA, is nine parts per million (9 ppm) over an eight-hour period. See 40 C.F.R. § 50.8(a)(1) (1988). An additional standard, which the Project also met, is 35 ppm for a one-hour period. See id. at § 50.8(a)(2).

transportation-related mitigation measures into the Project. See Wilder v. Thomas, 854 F.2d at 611 (PA 9). They then specifically found that, with such mitigation measures, the completed Project would cause no violations of the 9 ppm NAAQS for carbon monoxide.[4]

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[4]After issuance of the FEIS, but before Project approval, UDC added 25 more parking spaces under the wholesale mart included in the Project. See RA 22. Before incorporating this change into the Project, however, UDC conducted a detailed Environmental Assessment and determined that the inclusion of 25 additional parking spaces would have no significant impacts on traffic or air quality and would continue to satisfy the 9 ppm NAAQS for carbon monoxide. As explained further below, the inclusion of these additional 25 parking spaces was also fully litigated through three tiers of state courts in a lawsuit challenging the adequacy of UDC's traffic and air quality analysis and its mitigation measures. See Rosenthal v. New York State Urban Development Corp., No. 3020/85 (Sup. Ct. N.Y. Cty. June 25, 1985), aff'd in part and modified in part sub nom. Jackson v. New York State Urban Development Corp., 110 A.D.2d 304, 494 N.Y.S.2d 700 (1st Dep't 1985), aff'd, 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986).

See PA 108. On October 4, 1984, after making this and other detailed environmental findings, UDC's Directors approved the Project.[5] See Wilder v. Thomas, 854 F.2d at 610 (PA 8).

The New York City Board of Estimate then conducted public hearings on the Project, and on November 9, 1984, also approved the Project. See id. at 611 (PA 10). In its resolution of approval, the Board of Estimate expressly concurred in and adopted UDC's environmental

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[5]The petitioners' statement of the facts materially misrepresents the Project's air quality impacts (as indisputably disclosed in the FEIS), and, as a result, the issues before the courts below. As the petitioners' counsel knows, the 9.3 ppm carbon monoxide concentration referred to on page 7 of the Petition is for the Project with 920 parking spaces, which was not adopted by UDC's Directors. By contrast, the Project that was approved (with 345 parking spaces) was found to satisfy the 9 ppm standard. See RA 2-3. Even during construction, there is no longer any possibility of the Project's exceeding the NAAQS. See id. at 3-4.

findings, including the finding that with the mitigation measures identified in the FEIS, the NAAQS for carbon monoxide would not be violated by the approved Project.[6] See id.

B. State Court Proceedings

After approval of the Project, various of the petitioners in this case, their corporate entities, or their counsel brought 13 separate lawsuits in connection with the Project.[7] In par-

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[6]The petitioners do not, because they cannot, cite any authority for their false claim that the New York City Department of Environmental Protection ("DEP"), which also reviewed the Project's FEIS, found that violations of the NAAQS would persist after completion of the Project, even with mitigation measures. See Petition, at 7-8. DEP in fact found that the Project would meet the NAAQS even during its construction period. See RA 13-19.

[7]These suits, in addition to the SEQRA proceeding discussed below, include: seven state court proceedings pursuant to SEQRA, New York's Eminent Domain Procedure Law, the New York

(continued...)

ticular, they commenced a state court proceeding challenging UDC's approval of the Project on the grounds that it violated SEQRA. The principal SEQRA claim was a challenge to the adequacy of the FEIS traffic and air quality analysis and related mitigation measures, including an allegation that the FEIS analysis was wrong in concluding that the Project would not cause violations of the 9 ppm NAAQS for carbon monoxide.

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[7](...continued)
State Urban Development Corporation Act, or New York City's Uniform Land Use Review Procedure; five state court proceedings seeking production of documents pursuant to New York's Freedom of Information Law; and a federal court action alleging a violation of the United States Constitution. A 14th suit, challenging the Project's subway improvements, was filed just two weeks ago. See Broadway Plus Corp. and Rosenthal & Rosenthal, Inc. v. Metropolitan Transportation Authority of the State of New York, et al., No. 1447/89 (Sup. Ct. N.Y. Cty. filed January 20, 1989).

After extensive briefing and oral argument, the New York State Supreme Court dismissed all the traffic and air quality claims and remanded two non-traffic claims to the agency. On cross-appeals, a unanimous panel of the Appellate Division, First Department, specifically upheld the FEIS traffic and air quality analysis, and dismissed the entire lawsuit. That dismissal was then unanimously affirmed, in a lengthy opinion, by the New York State Court of Appeals. See Jackson, supra, aff'g 110 A.D.2d 304, 494 N.Y.S.2d 700 (1st Dep't 1985), aff'g in part and modifying in part Rosenthal v. New York State Urban Development Corp., No. 3020/85 (Sup. Ct. N.Y. Cty. June 25, 1985).

C. Federal District Court Proceedings

The day after the Appellate Division dismissed this SEQRA challenge, the

petitioners filed their first complaint in this action. That complaint alleged that the Project would cause violations of the NAAQS for carbon monoxide or would interfere with reasonable further progress in achieving compliance with the NAAQS. The respondents moved to dismiss the complaint on the basis of res judicata and collateral estoppel, as well as the well established rule barring CAA citizen suits alleging direct violations of the NAAQS. The respondents pointed out that a citizen suit is permissible under the CAA only if it alleges violations of an "emission standard or limitation," 42 U.S.C. § 7604, such as "a specific strategy or commitment" in the EPA-approved State Implementation Plan ("SIP") adopted by a state to achieve compliance with the NAAQS. Council of Commuter Organizations

v. Metropolitan Transportation Authority, 683 F.2d 663 (2d Cir. 1982); see Suburban O'Hare Comm'n v. Dole, 787 F.2d 186, 197-98 (7th Cir.), cert. denied, 107 S. Ct. 169 (1986); Action for Rational Transit v. West Side Highway Project, 669 F.2d 614 (2d Cir. 1983); League to Save Lake Tahoe, Inc. v. Trounday, 598 F.2d 1164, 1173 (9th Cir.), cert. denied, 444 U.S. 943 (1979). Without reaching the res judicata or collateral estoppel issues, the district court (Griesa, J.) dismissed the complaint, which it found to be a "waste of [the court's] time," RA 12, for failure to allege any violation of New York's SIP. On its own motion, the court gave the petitioners leave to replead if they could allege specific violations of the SIP attributable to the Project.

The petitioners then submitted a proposed amended complaint, purporting to allege violations of the SIP resulting from the Project. The district court found that the proposed amended complaint also failed to state a claim because the supposed violations were: (1) really alleged violations of the NAAQS, rather than of the SIP, and thus were not judicially cognizable; (2) not pleaded with the specificity required by the Second Circuit in Council of Commuter Organizations and Action for Rational Transit; (3) in the case of the petitioners' challenge to UDC's traffic mitigation measures, already decided adversely to the petitioners by the New York Court of Appeals in Jackson; and (4) in the case of reporting provisions allegedly violated by the City and State respondents (though not by UDC), not enforce-

able by means of a citizen suit. Having twice failed to frame a legally sufficient set of claims under the CAA, the petitioners were denied permission to file and serve the amended complaint. The petitioners appealed that decision to the Second Circuit.

D. The Second Circuit's Decision

The Second Circuit affirmed the order of the district court. In affirming the denial of permission to file the proposed amended complaint, the Second Circuit held that: (1) the petitioners' first claim merely restated their improper challenge to compliance with the NAAQS; (2) the third and sixth claims alleged violations of requirements not in fact imposed by the SIP; and (3) the petitioners' second, fourth, and fifth claims -- the only claims at issue in this petition -- were barred

under the doctrine of collateral estoppel.[8]

The court correctly stated that New York law imposed two requirements for application of collateral estoppel: first, "there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling." Wilder v. Thomas, 854 F.2d at 617 (PA 20-21) (quoting Schwartz v. Public Administrator of the County of Bronx, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 960 (1969)). The court found that, on the

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[8]The petitioners' request for a rehearing of the entire case by the Second Circuit was denied on September 7, 1988.

facts of this case, both requirements were satisfied.

The court found the petitioners were trying to relitigate the adequacy of UDC's traffic mitigation measures -- the very issue they had already litigated in the state courts -- in the guise of challenging alleged violations of the SIP. The different standards contained in SEQRA and the CAA did not preclude a finding of identity of issue in this case because UDC (during its approval process and in its FEIS) and the parties (in their pleadings and arguments before both the state and federal courts) had consistently looked to the NAAQS as the standard that must be attained by the Project. "Thus, even if UDC could have applied a less stringent standard to satisfy SEQRA's requirements, it did not in fact do so." Wilder v. Thomas,

854 F.2d at 619 (PA 25) (emphasis added). Moreover, because both the parties and the courts relied on the NAAQS in evaluating UDC's compliance with SEQRA, "the adequacy of the mitigation measures under the CAA was, as a practical matter, a necessary component in the state court's decision." Id. at 620 (PA 26).

The Second Circuit also found that the petitioners had a full and fair opportunity to litigate the adequacy of the mitigation measures. The court noted initially that, even if the issue had first been raised in federal court pursuant to the CAA, review of the sufficiency of the mitigation measures would have been identical to that undertaken by the state courts. This was so because the SIP itself had designated the SEQRA EIS process as the primary mechanism by which New York was to

evaluate the air quality impacts of individual projects and because the standards for review of agency determinations in New York State and in the federal courts are essentially the same. Id. at 619 (PA 25). Thus, the petitioners received the same hearing pursuant to SEQRA, and the same review by the courts, that they would have received if they had initially brought their claims pursuant to the CAA. Second, UDC's use of the federal NAAQS when conducting the environmental review pursuant to SEQRA meant that "the differences in applicable law [were] a matter of form rather than substance." Id. at 620 (PA 27). These two facts, in conjunction with a variety of additional factors (including the fact that the petitioners were represented by the same counsel in both state and federal

courts),[9] persuaded the court that the second requirement for application of collateral estoppel had also been satisfied in this case.

As the above discussion shows, the Second Circuit's holding as to the second, fourth, and fifth claims was extremely narrow. The Second Circuit's opinion nowhere asserts, or even implies, that SEQRA review generally bars all claims pursuant to the CAA, as the petitioners would have this Court believe. To the contrary, the Second Circuit carefully confined its holding to the particular facts of this case, where UDC incorporated the NAAQS into the SEQRA process, which was specifically designated in the New York SIP as the primary mechanism for air quality review. Under these circumstances, where both

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[9] See id.

the federal and state standards and the federal and state procedures for assessing air quality impacts had effectively been rendered identical, and where the adequacy of that assessment had been upheld by three tiers of state courts applying virtually the same standard of review as the federal courts, the court found the petitioners collaterally estopped from asserting CAA claims challenging the FEIS conclusion that the Project would not result in any violations of the carbon monoxide (or any other) NAAQS.[10] A decision as

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[10]Both the district court and the Second Circuit determined that the petitioners' fourth and fifth claims, although dressed up in different garb, essentially raised complaints about the adequacy of mitigation measures and the sufficiency of the FEIS. See Wilder v. Thomas, 659 F. Supp. at 1511 (PA 50), aff'd, 854 F.2d at 621 (PA 29). These claims, as well as the second claim, were therefore properly precluded by the state court litigation. Moreover, the

(continued...)

limited and fact-bound, and as clearly correct, as this one does not merit review by this Court.

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[10](...continued)
district court found that, to the extent that the fourth and fifth claims alleged the failure of state and city agencies to submit adequate reports to the EPA, those claims were not cognizable under the CAA citizen suit provision. See id. at 1510-11 (PA 50).

## REASONS FOR DENYING THE WRIT

### POINT I

### THIS CASE IS FACT-BOUND AND RAISES NO GENERAL POINT OF LAW

The petitioners in this case seek review only of that portion of the Second Circuit's decision holding them collaterally estopped from asserting their second, fourth, and fifth CAA claims. The petitioners do not contest the Second Circuit's articulation of the doctrine of collateral estoppel under New York law. Rather, they challenge the court's findings that: (1) the petitioners already litigated in state court the identical issue they seek to litigate in federal court, namely the adequacy of the Project's FEIS, see Petition at 10-13; (2) this issue was necessarily decided by the state court, see Petition at 13; and (3) the petitioners had a full and fair oppor-

tunity to litigate this issue in state court, see Petition at 15-16. In other words, the petitioners concede that the Second Circuit applied the correct general rule of collateral estoppel, as it is firmly established in New York law, but dispute the court's application of the rule to the specific facts of this case. The application of a well established rule to the facts peculiar to a single case is not a matter worthy of a writ of certiorari. See Supreme Court Rules, Rule 17(1).

In an attempt to manufacture an issue worthy of review by this Court, the petitioners repeatedly stretch the Second Circuit's holding far beyond its actual scope. The petitioners pretend that the Second Circuit introduced a general legal principle that all CAA claims are barred by the prior litigation

of SEQRA claims. See Petition at 13, 14. Resolution of the questions presented by this case did not require so sweeping a pronouncement, however, and the Second Circuit therefore properly refused to make it. Indeed, the Second Circuit expressly acknowledged that "the SEQRA standard . . . does not, on its face, embody the absolute requirement that the NAAQS be attained," Wilder v. Thomas, 854 F.2d at 618 (PA 24), and therefore SEQRA litigation would not necessarily preclude CAA claims. Nevertheless, the Second Circuit determined that UDC's utilization of the federal 9 ppm standard for carbon monoxide in this particular case rendered the difference between the two statutory stan-

dards of no practical significance.[11] See id. at 618-19 (PA 24-25).

The Second Circuit's opinion not only does not declare the far-reaching and novel legal principle attributed to it by the petitioners but contains

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[11]UDC's FEIS utilized the 9 ppm carbon monoxide NAAQS in order to ensure compliance with section 3.6(A) of the New York SIP, which provides in relevant part:

> [I]f an EIS for a project proposal identifies a violation . . . of the carbon monoxide standard, then the City commits to assure that mitigating measures will be implemented by the Project sponsor or City, so as to provide for attainment of the standard by December 31, 1987 and maintenance of it thereafter.

PA 82 (emphasis added). The petitioners fail to quote the underlined portion of this provision, which conditions mitigation on the finding of a violation. See PA 4. Because the FEIS identified no violation of the carbon monoxide NAAQS, UDC and the City could approve the Project, as planned, without further mitigation (beyond that already incorporated into the Project) and without any conflict between UDC's SEQRA and SIP obligations.

unmistakable indications that the Second Circuit would reject such a principle. The court repeatedly refers to specific facts that ensured that the petitioners' proposed claims pursuant to the CAA had already been fully and fairly litigated in the state proceedings challenging UDC's compliance with SEQRA. Central among these facts are: (1) UDC's utilization of the federal NAAQS when conducting environmental review of the Project pursuant to SEQRA, (2) the New York SIP's provision for using the SEQRA process as the primary mechanism for assessing air quality impacts of a project, and (3) the virtual identity of the New York State and federal standards for reviewing administrative determinations. The clear implication of the Second Circuit's analysis is that where these facts do not obtain, CAA claims

would not be barred. Collateral estoppel could properly be applied in this case, however, because the environmental review of the Project conducted pursuant to SEQRA incorporated federal standards for air quality and determined that those standards were in fact satisfied by the Project.

The petitioners' protestations that the Second Circuit's decision "creates several areas of nonuniformity in the national administration of the Clean Air Act," Petition at 15, can now be recognized as utterly preposterous. The decision does not determine the federal standard under the CAA by reference to a state standard, as the petitioners claim, see id. at 15, 19; rather, it permits SEQRA litigation to bar the petitioners' citizen suit claims pursuant to the CAA only because, as

contemplated by the SIP, UDC incorporated the federal standard into the state air quality review. Because the Second Circuit's holding applies only when state agencies apply the NAAQS in their own environmental review, the decision presents no threat to consistent enforcement of the CAA.

## POINT II

## THE DECISION IN THIS CASE DOES NOT CONFLICT WITH DECISIONS IN OTHER FEDERAL CIRCUIT COURTS

The petitioners could not begin to find conflicts between the decision in this case and those in other federal circuit courts without baldly misstating the Second Circuit's holding, as they have done here. Once the actual scope of the Second Circuit's decision is understood, the alleged conflicts immediately evaporate.

The petitioners claim that the Second Circuit applied the SEQRA standard to the CAA claims. See Petition at 15, 19. The truth is precisely the reverse: UDC applied the NAAQS throughout the SEQRA process, as it was required to do under the SIP. UDC and the City of New York did not seek merely to minimize air quality impacts; nor did they balance

social or economic considerations against the value of clean air. Indeed, they had no reason to do so because the 920-parking-space alternative (to which the Petition refers, on page 7, in citing a carbon monoxide concentration of 9.3 ppm) was not part of the Project. UDC and the Board of Estimate approved the Project, with 345 parking spaces, only upon finding that it would in fact comply with the NAAQS -- and three levels of state courts upheld that determination in finding that UDC's traffic and air quality analysis complied fully with the requirements of SEQRA. Because the petitioners could not challenge UDC's compliance with the SIP -- which itself mandated UDC's use of the SEQRA process -- without relitigating precisely the same issues already fully and fairly litigated in the state courts, the

Second Circuit correctly recognized that the petitioners' CAA claims were barred.

Because the Project was found to meet the NAAQS, neither UDC, the district court, nor the Second Circuit was called upon to decide whether economic or social considerations are cognizable in CAA enforcement proceedings. This question was simply not raised by the Project, included in any pleading, briefed or argued by any party, or discussed in either the district court or Second Circuit opinions. Because the Second Circuit did not (and, on these facts, could not) reach this issue, the decision in this case presents no conflict with decisions of other courts resolving the question either

way. Because the alleged conflict is entirely illusory, the petition for a writ of certiorari should be denied.

## POINT III

### THE DECISION IS NOT INCONSISTENT WITH DECISIONS OR POLICIES OF THIS COURT

The petitioners also claim that the Second Circuit's decision is inconsistent with Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982). See Petition at 15-16. In Kremer, this Court recognized that "judicial affirmance of an administrative determination is entitled to preclusive effect." 456 U.S. at 481 n.21. This Court also emphasized that the "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." Id. at 481. The petitioners do not contest the constitutionality of the state administrative and judicial proceedings. Thus, the very case with which the

petitioners claim this case is inconsistent, is actually authority supporting the Second Circuit's decision.

The petitioners pretend to find an inconsistency by noting that the administrative determination in Kremer followed a hearing in which the "complainant [sic] had an opportunity 'to rebut evidence submitted [to] or obtained from the respondent.'" See Petition at 16 (quoting Kremer, 456 U.S. at 483). They claim that they did not receive a full and fair opportunity to litigate their claims because they did not receive a trial-type hearing before the administrative agency. See Petition at 15-16. They argue that when the agency does not act in an adjudicatory capacity, state proceedings are not entitled to full faith and credit.

As the Second Circuit pointed out, however, the petitioners would not be entitled to an evidentiary hearing even if their CAA claims were allowed. Because the SIP designates the SEQRA process as the mechanism for CAA review, the federal court, like the state courts, would review UDC's findings to determine "whether the agency has complied with the applicable law, identified the relevant areas of environmental concern, taken a 'hard look' at them and made a reasoned elaboration of the basis for its determinations." Jackson, 110 A.D.2d at 307-08, 444 N.Y.S.2d at 703; see Wilder v. Thomas, 854 F.2d at 610 (PA 24)(quoting Kleppe v. Sierra Club, 429 U.S. 390, 410 n.21 (1976) ("The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences.")); see also

Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983); New York v. Kleppe, 427 U.S. 1307, 1311 (1976). Moreover, "no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." Kremer, 456 U.S. at 483. The petitioners have received the only hearing to which they are entitled, and, under Kremer, the judicial affirmance of the results of that hearing precludes relitigation of the claims adjudicated in the state proceedings.

The petitioners' argument that the Second Circuit's decision will induce (New York) litigants to bypass state remedies and to channel environmental litigation into the federal courts also rests on the erroneous assumption that federal litigants would be entitled to

an evidentiary hearing. They claim that "it would be a rare litigant that would forego [sic] the benefits of a full evidentiary hearing in federal court . . . for a deferential review of the administrative record in state court . . . ." See Petition at 24. Citizens filing suit in federal court to enforce compliance with the New York SIP in circumstances such as these would not be entitled to an evidentiary hearing because "SEQRA's EIS process was designated in the SIP as the primary mechanism for indirect source review." Wilder v. Thomas, 854 F.2d at 619 (PA 25). Therefore, the Second Circuit's decision provides no incentive for bypassing state court remedies.

The "bypass" argument also presupposes the accuracy of the petitioners' misstatement of the Second Circuit's

holding. Once again, the petitioners insist that the Second Circuit is permitting every SEQRA action to preclude all CAA claims. See Petition at 22. The Second Circuit did not endorse such a broad proposition. Indeed, the opinion suggests that when a state EIS prepared pursuant to SEQRA reveals a violation of the NAAQS, litigants will have available both SEQRA and CAA actions. Therefore, the Second Circuit's decision is not inconsistent with this Court's policy that federal remedies should supplement, not supplant, state court remedies.

## CONCLUSION

For the reasons stated above, the Court should deny the petition for a writ of certiorari.

Dated: New York, New York
February 2, 1989

Respectfully submitted,

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# APPENDIX

[JA 465]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 8356 (TPG)

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STEPHEN F. WILDER, BRENDAN GILL, IMRE J. ROSENTHAL, STEPHEN ROSENTHAL, ROBERT NEUWIRTH, LORI JEAN SAIGH, and the WHITBY TENANTS' ASSOCIATION,

Plaintiffs,

v.

LEE M. THOMAS, as Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; REGION II of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; NEW YORK STATE URBAN DEVELOPMENT CORPORATION; VINCENT TESE, as Chairman of the New York State Urban Development Corporation; TIMES SQUARE REDEVELOPMENT CORPORATION; ROBERT M. HALL, as President of the Times Square Redevelopment Corporation; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; HENRY G. WILLIAMS, as Commissioner of the New York State Department of Environmental Conservation; DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK; JOSEPH T. McGOUGH, JR., as Commissioner of the Department of Environmental Protection of the City of New York; MARIO M. CUOMO, as Governor of the State of New York; and EDWARD I. KOCH, as Mayor of the City of New York,

Defendants.

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AFFIDAVIT OF IRWIN FRUCHTMAN
IN SUPPORT OF MOTION DISMISS

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK)

IRWIN FRUCHTMAN, being duly sworn, deposes and says:

1. I am Vice-President-Construction of defendant

[JA 466]

Times Square Redevelopment Corporation ("TSRC"), a subsidiary of the New York State Urban Development Corporation ("UDC"), created to assist UDC in carrying out the 42nd Street Development Project (the "Project"). I am fully familiar with the facts set forth below and submit this affidavit in support of the motion of UDC and TSRC to dismiss the complaint in this action.

2. Before assuming my present duties, I served as Vice-President-Construction of UDC from December 1984 to June 1985, and as Vice-President of TSRC until December 1984. In my earlier position at TSRC, my principal responsibility was to supervise the environmental analysis of the Project, including preparation of both the draft environmental impact statement and final environmental impact statement ("FEIS") prepared by UDC in discharge of its responsibilities under the New York State Environmental Quality Review Act ("SEQRA").

3. The FEIS includes a detailed analysis of the Project's air quality impact at the time of its scheduled completion in 1991. That analysis, which was subjected to extensive public comment in accordance with SEQRA, concludes that the Project will result in no violation of applicable national ambient air quality standards ("NAAQS") promulgated by the Environmental Protection Agency ("EPA") under the Clean Air Act (the "Act"). Attached as Exhibit A hereto is Table 5-3, included in the FEIS, summarizing the Project's expected

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carbon monoxide impacts after giving effect to the detailed mitigation measures incorporated in the Project.[1] This table indicates that at *no* location will the completed Project, as approved,

[1] The table shows projections for the Project with 320 parking spaces, which is the number included in the Project as approved. An alternative with 920 spaces was not adopted by UDC.

cause carbon monoxide levels to exceed the applicable 8-hour standard of 9 parts per million ("ppm") adopted by EPA under the Act.

4. As part of its overall SEQRA responsibilities, UDC also analyzed the environmental impacts of the Project's construction phase. This analysis included, among other factors, an assessment of air quality impacts during construction. Attached as Exhibit B is Table 3-4, also included in the FEIS, summarizing expected carbon monoxide levels during the Project's construction phase in 1988. That table indicates that the 9 ppm standard will not be exceeded at any of the Project's air quality locations, with one possible exception. Because of uncertainty at the time the FEIS was prepared about the precise construction scenario, the document did indicate a conditional exceedance at Broadway and 41st Street (which would have been caused by a temporary traffic detour to permit renovation of the Times Square subway station). However, the FEIS made clear that even this exception was "unlikely." This was so, according to the FEIS,

[JA 468]

because exceedance of the 9 ppm standard would occur only if construction on the Project's "Site 1" had been completed by 1988. But if that Site is instead an empty lot in 1988 (which the FEIS indicated was the more likely circumstance), the FEIS reported that carbon monoxide levels at even that location "would not exceed 6.0 ppm." FEIS at 3-26. (A copy of the section of the FEIS that includes page 3-26 is attached as Exhibit C hereto).

5. Since completion of the FEIS and approval of the Project by UDC, UDC has continued to review and refine its construction plans for the Project. As a result of that review, as well as the delays attributable to prolonged litigation challenging the Project, it is now certain that construction on Site 1 will not be completed by 1988 (although demolition of existing structures on that Site is expected to be complete by 1988). As a result, the "unlikely" construction scenario referred to in the FEIS is not expected to occur, and thus the possible temporary exceedance of

the 9.0 ppm carbon monoxide standard referred to in the FEIS is not expected to occur either.

/s/ Irwin Fruchtman

Sworn to before me this
6th day of February, 1986.

/s/ Joseph C. Petillo

Notary Public

JOSEPH C. PETILLO
NOTARY PUBLIC, State of New York
No. 31-4834610
Qualified in New York County
Commission Expires March 30, 1987.

Table 5-3

MAXIMUM ONE- AND EIGHT-HOUR PREDICTED
CARBON MONOXIDE CONCENTRATIONS IN THE YEAR 1991 WITH THE PROJECT*
320 ON-SITE SPACES WITH MITIGATION

| | | One-Hour | | | Eight-Hour | | |
|---|---|---|---|---|---|---|---|
| Receptor | Location | HIWAY | APRAC | SONDEL** | HIWAY | APRAC | SONDEL** |
| 1 | 40th St. between 7th & 8th Aves. | 7.3 | 8.5 | 14.0 | 4.6 | 5.4 | 8.5 |
| 2 | 41st St. between 7th & 8th Aves. | 6.3 | 6.7 | 8.2 | 4.0 | 4.3 | 5.1 |
| 3 | 42nd St. between 7th & 8th Aves. | 9.8 | 10.9 | N/A | 6.3 | 7.0 | N/A |
| 4 | 43rd St. between 7th & 8th Aves. | 7.3 | 8.4 | N/A | 4.6 | 5.4 | N/A |
| 5 | 43rd St. between Broadway & Ave. of the Americas | 7.2 | 7.3 | N/A | 4.6 | 4.6 | N/A |

* All values are given in parts per million (ppm). The values presented are the second highest for the year, since standards may be exceeded once a year.

** Where theoretically applicable.

Exhibit A

Table 5-3

MAXIMUM ONE- AND EIGHT-HOUR PREDICTED
CARBON MONOXIDE CONCENTRATIONS IN THE YEAR 1991 WITH THE PROJECT*
320 ON-SITE SPACES WITH MITIGATION

| | | One-Hour | | | Eight-Hour | | |
|---|---|---|---|---|---|---|---|
| Receptor | Location | HIWAY | APRAC | SONDEL** | HIWAY | APRAC | SONDEL** |
| 6 | 8th Ave. between 41st & 42nd Sts. | 10.5 | 9.9 | N/A | 6.7 | 6.3 | N/A |
| 7 | 7th Ave. between 42nd & 43rd Sts. | 10.7 | 10.4 | N/A | 6.9 | 6.7 | N/A |
| 8 | Broadway between 42nd & 43rd Sts. | 7.6 | 7.3 | 14.1 | 4.8 | 4.6 | 8.6 |
| A | Intersection of 8th Ave. & 42nd St. | 12.4 | N/A | N/A | 8.0 | N/A | N/A |
| B | Intersection of 7th Ave. & 42nd St. | 13.3 | N/A | N/A | 8.6 | N/A | N/A |
| C | Intersection of Broadway & 42nd St. | 11.5 | N/A | N/A | 7.4 | N/A | N/A |

* All values are given in parts per million (ppm). The values presented are the second highest for the year, since standards may be exceeded once a year.

** Where theoretically applicable.

Exhibit A

## Table 3-4
## MAXIMUM ONE- AND EIGHT-HOUR PREDICTED CARBON MONOXIDE CONCENTRATIONS IN THE YEAR 1988 WITH THE PROJECT* 320 ON-SITE SPACES WITH MITIGATION

| Receptor | Location | One-Hour | | | Eight-Hour | | |
|---|---|---|---|---|---|---|---|
| | | HIWAY | APRAC | SONDEL** | HIWAY | APRAC | SONDEL** |
| 1 | 40th St. between 7th & 8th Aves. | 7.9 | 9.1 | 14.9 | 5.0 | 5.8 | 9.0 |
| 2 | 41st St. between 7th & 8th Aves. | 7.0 | 7.2 | 10.2 | 4.4 | 4.6 | 6.3 |
| 3 | 42nd St. between 7th & 8th Aves. | 10.6 | 11.7 | N/A | 6.8 | 7.5 | N/A |
| 4 | 43rd St. between 7th & 8th Aves. | 8.1 | 9.2 | N/A | 5.1 | 5.9 | N/A |
| 5 | 43rd St. between Broadway & Ave. of the Americas | 7.9 | 9.4 | N/A | 5.0 | 6.0 | N/A |



* All values are given in parts per million (ppm). The values presented are the second highest concentrations for the year since standards can be exceeded once a year.

** Where theoretically applicable.

*** This concentration would occur between 41st and 42nd Streets, but only if Site 1 is built before Site 12. If Site 12 is built first, Site 1 will be an empty lot in 1988 and, as a result, no SONDEL canyon will exist. Under such circumstances, eight-hour concentration at the Broadway receptor would be less than 9.0 ppm.

Exhibit B

## Table 3-4

## MAXIMUM ONE- AND EIGHT-HOUR PREDICTED CARBON MONOXIDE CONCENTRATIONS IN THE YEAR 1988 WITH THE PROJECT* 320 ON-SITE SPACES WITH MITIGATION

| Receptor | Location | One-Hour | | | Eight-Hour | | |
|---|---|---|---|---|---|---|---|
| | | HIWAY | APRAC | SONDEL** | HIWAY | APRAC | SONDEL** |
| 6 | 8th Ave. between 41st & 42nd Sts. | 11.8 | 11.2 | N/A | 7.6 | 7.2 | N/A |
| 7 | 7th Ave. between 42nd & 43rd Sts. | 12.5 | 11.5 | N/A | 8.0 | 7.4 | N/A |
| 8 | Broadway between 42nd & 43rd Sts. | 9.2 | 9.2 | 16.5 | 5.9 | 5.9 | 10.0*** |
| A | Intersection of 8th Ave. & 42nd St. | 13.8 | N/A | N/A | 8.9 | N/A | N/A |
| B | Intersection of 7th Ave. & 42nd St. | 13.9 | N/A | N/A | 9.0 | N/A | N/A |
| C | Intersection of Broadway & 42nd St. | 12.6 | N/A | N/A | 8.1 | N/A | N/A |

* All values are given in parts per million (ppm). The values presented are the second highest concentrations for the year since standards can be exceeded once a year.

** Where theoretically applicable.

*** This concentration would occur between 41st and 42nd Streets, but only if Site 1 is built before Site 12. If Site 12 is built first, Site 1 will be an empty lot in 1988 and, as a result, no SONDEL canyon will exist. Under such circumstances, eight-hour concentration at the Broadway receptor would be less than 9.0 ppm.

Exhibit B

[JA 471]

*Carbon Monoxide Concentrations in the Project Area*

Tables 3-3, 3-4 and 3-5 show maximum predicted one-and eight-hour carbon monoxide concentrations at each of the 11 receptor locations in the year 1988, with and without the project, both for the 320 and 920 parking space scenarios.

Table 3-6 summarizes the maximum predicted eight-hour carbon monoxide concentrations, using consistent models, at each receptor location in 1988 without the project and with the project with mitigation, and indicates for each location the incremental change due to the project with mitigation.

As can be seen from these tables, there are no violations of the one-hour standard. However, there are several instances where carbon monoxide concentrations exceed 9.0 parts per million over eight hours.

Specifically, without the project, eight-hour violations are shown at Receptor Locations 1 (40th Street), 6 (Eighth Avenue), A (Intersection of Eighth Avenue and 42nd Street) and B (Intersection of Seventh Avenue and 42nd Street). At 40th Street (where the violation is shown only with the SONDEL model), the predicted concentrations under worst case meteorological conditions are 10.1 ppm, while at Eighth Avenue, the predicted concentrations using APRAC are 9.9 ppm. At the Seventh and Eighth Avenue intersections, the predicted concentrations under worst case meteorological conditions are 9.7 and 10.6 ppm, respectively.

With the project and the 320 parking space scenario, with one exception, there are no violations at the intersections or at any of the Avenue or cross-street receptor locations. Using the SONDEL model, however, there is one instance—on Broadway (Receptor Location 8)—where an eight-hour concentration in excess of 9 ppm is shown. There, the predicted 1988 concentration, with worst case meteorological and peak traffic conditions, is 10.0 ppm compared to 8.3 ppm without the project. This is

a significant difference, but it is a temporary condition resulting from a construction situation. More specifically, as noted in Subsection F above, in 1988, construction work may

[JA 472]

still be underway on the Times Square subway station, resulting in the continued closing of three lanes of Seventh Avenue between 41st and 42nd Streets. This, in turn, requires that some traffic be diverted down Broadway as far as 41st Street to avoid the construction bottleneck; and it is this diversion that results in the reading of 10.0 ppm under worst-case meteorological conditions. This situation is expected to persist for about a year, but once the subway work is complete, the diversions will end and so will the elevated levels of carbon monoxide.

Furthermore, the 10 ppm reading is itself unlikely. This is the case because in 1988, Site 1 will probably be an empty lot, with no construction expected there until 1989. If this is so, a SONDEL canyon will not exist at the receptor location, due to the large open area between 41st and 42nd Streets. As a result, ventilation will be greatly improved and eight-hour CO concentrations would not exceed 6.0 ppm.

With the project and the 920 space parking scenario, the situation would be the same as for the 320 space scenario, with one exception: on 40th Street, an eight-hour concentration of 10.1 ppm is predicted under worst-case meteorology. This is the same as the predicted concentration without the project and thus would not make the situation any worse than it would otherwise be; nor would it be a legal impediment to the project under the State indirect source permit regulations. Nonetheless, if it were subsequently deemed desirable to build as many as 920 on-site spaces, some additional mitigation would probably be advisable. This could be accomplished, for example by phasing in parking spaces between 1988 and 1991 or by restricting the number of available parking spaces when adverse meteorological conditions are predicted.

[JA 497]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 8356 TPG

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STEPHEN T. WILDER, et al.,

Plaintiff,

v.

LEE M. THOMAS, et al.,

Defendant.

---

June 26, 1986

2:45 p.m.

(Case called; both sides ready)

THE COURT: The reason I called you together is that in struggling with these motions I suddenly remembered that there is something called a motion for a more definite statement and I honestly must say that I think at least as to some of the defendants that would have been the

[JA 498]

appropriate motion because the complaint is far from definite and it make it difficult for a defendant to really know what the claim is that is being dealt with and it certainly makes it difficult for me to know what I am dealing with.

Now, I just want to give you a little illustration and what I am leading up to is I am not deciding any motion now. It has been a waste of my time and my office's time to have to deal with such a complaint and

(Continued on next page)

[JA 499]

it was a waste of the defendant's time to have to deal with such a complaint and perhaps they should have thought of the motion for a more definite statement. But the real vice was to have a complaint which is so lacking in any clear definition of what the claim is.

Now, I would like to just illustrate this: There is in the plaintiff's memorandum, dated January 21, 1986, a section entitled plaintiff's may maintain a citizens suit against the state and city defendants because they are violating the SIP. There is a section of about 10 pages beginning at page 28. Then there is a kind of rambling discussion in of ways in which the SIP is violated, mainly by reference to a letter from the EPA to the Department of Environmental Conservation dated August 2, 1985. It's as if the EPA is the plaintiff and of course the EPA is not the plaintiff here. But in this kind of loose way that the plaintiff's use in their presentation there is the discussion in the brief, mainly a quotation from this letter.

[JA 607]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 8356 (TPG)

---

STEPHEN F. WILDER, BRENDAN GILL, IMRE J. ROSENTHAL, STEPHEN ROSENTHAL, ROBERT NEUWIRTH, LORI JEAN SAIGH, and the WHITBY TENANTS' ASSOCIATION,

Plaintiffs,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION; TIMES SQUARE REDEVELOPMENT CORPORATION; ROBERT M. HALL, as President of the Times Square Redevelopment Corporation; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; HENRY G. WILLIAMS, as Commissioner of the New York State Department of Environmental Conservation; DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK; JOSEPH T. McGOUGH, JR., as Commissioner of the Department of Environmental Protection; MARIO M. CUOMO, as Governor of the State of New York; and EDWARD I. KOCH, as Mayor of the City of New York,

Defendants.

---

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

HARVEY W. SCHULTZ, being duly sworn, deposes and says:

1. I am the Commissioner of the New York City Department of Environmental Protection. I am familiar with the facts set forth below and submit this affidavit in opposition to plaintiffs' application to amend their complaint in this action and to correct certain misstatements contained in plaintiff's memorandum in support of their application to amend.

[JA 608]

2. Plaintiffs have suggested that the City is failing to carry out measures required by the New York State Implementation Plan ("SIP") to eliminate carbon monoxide "hot spots" by the end of 1987. To the contrary, the City, through its Departments of Environmental Protection and Transportation, has been engaged in a vigorous program to identify candidate hot spots, evaluate those at which control measures will be required to meet all applicable carbon monoxide standards (including, in particular, the 8-hour standard of 9 ppm) and implement the control measures which are determined to be necessary to achieve that standard. The review of final environmental impact statements ("FEISs") for individual development projects to be undertaken in the City is a part, but only a part, of that process. The bulk of the City's efforts are directed towards the hot spot locations themselves, because any given hot spot site is a result of a far more complex aggregation of factors than simply one single project.

3. As part of this ongoing process of monitoring and reporting contemplated by the SIP, the City has recently submitted to the United States Environmental Protection Agency ("EPA") its 1985 drafts of two documents: (a) a report on "Reasonable Further Progress in 1985 Toward Attainment of Carbon Monoxide Standards annexed hereto as Exhibit A, and b) a report on the "Carbon Monoxide Control Program For Group IV Hotspot Sites," annexed hereto as Exhibit B. Together, these reports evaluate the effectiveness of the steps taken to date to deal with hot spots around the City, and also identify control measures to be implemented with respect to hot spots that have been more recently identified.

[JA 609]

4. The Group IV Hotspot Report specifically addresses a location at which the FEIS on the 42nd Street Development Project (the "Project") indicated the possibility of a temporary construction period exceedance of the carbon monoxide standard: Broadway between 42nd and 43rd Streets. The data developed for the FEIS were reanalyzed using the Mobile 3 computer model, the most current air quality model approved by EPA for this purpose and one which has become available for use in New York City after completion of the Project EIS. Using that model, the Report demonstrates that the worst 8-hour carbon monoxide concentration, without any additional mitigation beyond that contemplated by the Project itself, would be 8.6 ppm, below the applicable standard of 9.0 ppm. Accordingly, this site was determined to be one at which the implementation of addition control measures, beyond those committed to as part of the Project itself, will not be required. *See* Group IV Hotspot Report at Table I and III, pages 3 and 5.

5. The 1985 Reasonable Further Progress Report also discusses, among other things, the proposed 42nd Street Transitway. The Report indicates that the environmental impacts of the Transitway are now being reviewed, and that a draft environmental impact statement ("DEIS") is expected to be completed by December 1986. This DEIS will evaluate the air quality impacts of the proposed Transitway, including the possibility that traffic diversion which it causes could result in a significant increase in carbon monoxide concentrations at certain locations. Implementation of the Transitway proposal is contingent on the DEIS findings as to the Transitway's air quality impacts. As part of its base case, the Transitway

[JA 610]

DEIS will have to assume and take into account the completed 42nd Street Project, including the Project's mitigation measures.

6. Plaintiffs allege that the City has failed to commit to mitigation of the Project's air quality impacts. This is erroneous.

The City, a co-sponsor of the Project with the New York State Urban Development Corporation, formally approved the Project through Board of Estimate action on November 9, 1984. When the Board of Estimate approved the Project, it explicitly resolved that it "concurs in and adopts the UDC Findings," which were defined to include those findings made by UDC under the State Environmental Quality Review Act. *See* Board of Estimate Resolution, annexed hereto as Exhibit C, at pages 2-3, 9. The UDC findings, in turn, included the identification of mitigation measures necessary to avoid adverse air quality impacts from the Project. *See* UDC Findings, annexed hereto as Exhibit D, at pages 23, 26-27. Thus, the mitigation measures identified by UDC were a condition of City approval of the Project, and the City has committed to their implementation.

/s/ HARVEY W. SCHULTZ

Sworn to before me this

5th day of September, 1986

/s/ RICHARD E. JOSEPH
NOTARY PUBLIC

[notary public stamp illegible]

# THE CITY OF NEW YORK

# NEW YORK STATE IMPLEMENTATION PLAN

# CARBON MONOXIDE CONTROL PROGRAM

# FOR GROUP IV HOTSPOT SITES

Exhibit B

TABLE III

RE-ANALYSES OF HOTSPOT SITES IDENTIFIED IN 1984 FEISs USING MOBILE 3

| HOTSPOTS SITES | Volume (Veh./Hr) | Speed (mph) | Worst 8hr CO AQ Impact W/O Mitigation (ppm) | Worst 8hr CO AQ Impact With Mitigation | Models Used For Analyses | Name of Project |
|---|---|---|---|---|---|---|
| 1. 14th St. at Broadway | 768 EB<br>609 WB | 5.4 EB<br>8.2 WB | 6.1 | – | Mobile 3<br>Hiway 2 | Klein Development at Union Square |
| 2. Third Ave. 17-18 Sts. | 1108 NB<br>748 SB | 3.9 NB<br>11.8 SB | 8.0 | – | Mobile 3<br>Hiway 2 | Klein Development at Union Square |
| 3. Third Ave, 64-65 Sts. | 2403 | 7.5 | 7.6 | – | Mobile 3<br>Aprac | 51 Story Building at 3rd Ave, & 64th St. |
| 4. Broadway, 42nd-43rd Sts. | 1180 | 9.6 | 8.6 | – | Mobile 3<br>Sondel | 42nd St. Development |
| 5. Lexington Ave., 52-53rd Sts. | 1454 | 4.1/6.0 | 11.9 | 8.9 | Mobile 3<br>Sondel | Cadillac Fairview |
| 6. 52nd St. Lexington to 3rd Aves. | 598 | 5.0 | 8.7 | – | Mobile 3<br>Sondel | Cadillac Fairview |
| 7. 53rd St., Lexington to 3rd Aves. | 584 | 6.2 | 7.3 | – | Mobile 3<br>Sondel | Cadillac Fairview |
| 8. 6th Ave. at 42nd St. | 2134 | 4.1 | 9.4 | 8.4 | From FEIS | Bryant Park Restaurant & Restoration |

TABLE III

RE-ANALYSES OF HOTSPOT SITES IDENTIFIED IN 1984 FEISs USING MOBILE 3

| HOTSPOTS SITES | Volume (Veh./Hr) | Speed (mph) | Worst 8hr CO AQ Impact W/O Mitigation (ppm) | Worst 8hr CO AQ Impact With Mitigation | Models Used For Analyses | Name of Project |
|---|---|---|---|---|---|---|
| 9. 5th Ave. at 42nd St. | 2097 | 4.7 | 9.2 | 8.5 | From FEIS | Bryant Park Restaurant & Restoration |
| 10. West St., Laight to Vestry Sts. | 3842 NB<br>2306 SB | 6.6/7.2<br>9.3/9.9 | 10.7 | 9.2 | Mobile 3<br>Hiway 2 | Washington St. 6th Amended Plan |
| 11. West St., Warren to Chambers Sts. | 3483 NB<br>2208 SB | 5.1/10.0<br>18.1/19.0 | 11.1 | 8.0 | Mobile 3<br>Hiway 2 | Washington St. 6th Amended Plan |
| 12. Canal St., Lafayette to Broadway | 1383 EB<br>885 WB | 3.1 EB<br>11.3 WB | 7.5 | | See RFP for 1985, App. B | Washington St. 6th Amended Plan |
| 13. Church & Chambers Sts. | Chambers<br>WBW-CH 441<br>CH-BW 485<br>BW-CH 519<br>CH-WBW 474<br>Church<br>1500 | <br>6.9 EB<br>3.4 EB<br>3.1 WB<br>6.4 WB<br><br>6.8 NB | 8.8 | — | Mobile 3<br>Hiway 2 | Washington St., 6th Amended Plan |

NEW YORK STATE
URBAN DEVELOPMENT CORPORATION

**Findings With Respect to**
**42nd Street Development Project**
**New York, New York**

**Part II**

STATEMENT OF FACTS AND CONCLUSIONS

**A. Proposed Project**

4. *Sites Within The Project Area*

The Project area has been divided for planning purposes into 12 separate sites (shown in Exhibit 2 hereto) and three major clusters: the Seventh Avenue/Broadway sites (Sites 1, 2, 3, 4, and 12); the 42nd Street mid-blocks (Sites 5 on the north side of 42nd Street and Sites 6 and 10 on the south side); and Eighth Avenue (Sites 7 and 8). Two other mid-block sites (Sites 9 and 11) contain existing structures which are expected to be retained.

5. *Project Components*

The Project's several components reflect the goals outlined above. These components may be summarized as follows:

On the Seventh Avenue/Broadway Sites (Sites 1, 3, 4 and 12), a total of four new office buildings, ranging in height from 29 to 56 stories and containing approximately 4.1 million gross square feet (including ancillary retail and public space), are proposed to be developed. Additional office space will remain in the Candler Building (Site 11), the Selwyn Building (part of Site 5) and the New Amsterdam Theater (part of Site 6).

[JA 768]

On Sites 5, 6 and 10, the midblock sites, nine theater buildings will be maintained, renovated or otherwise adapted to reuse. As presently contemplated, most of these structures will be returned to legitimate or institutional (non-profit) theater use. However, the Empire (part of Site 10) will be renovated for retail, restaurant, or mart-related conference use, and the Times Square (part of site 5) is planned for retail or restaurant use. The Victory (intended for institutional use) and the Liberty (intended for both institutional and mart related auditorium use) could each be used for first-run movies on an interim basis until theater use becomes feasible. Responsibility for acquiring, renovating and operating each of the theaters will be shared among the office, mart and theater developers (who will contribute funds toward acquisition and renovation) and experienced theater operators. Specific responsibilities, and intended uses, for each of the theaters are summarized in Exhibit 3 hereto.

On Site 7, a new hotel, containing approximately 750 rooms, ancillary facilities, retail uses and up to two cinemas, will be constructed. On Site 8, a wholesale mart will be developed, containing approximately 2.4 million gross square feet devoted to computer and apparel wholesaling, as well as ancillary exhibition space and other support uses. Approximately 1.7 million square feet will be used for computer wholesaling, while approximately 560,000 square feet will be used for apparel wholesaling.

On Sites 9 and 11, the historic Candler Building (Site 11) and the Carter Hotel (Site 9) will remain as part of the Project, with the hotel's 42nd Street entrance incorporated into Site 7. The Project as originally presented proposed to retain and reclad the existing One Times Square building on Site 2. However, the project staff has recommended that the Project be modified to incorporate the alternative of substantially altering or completely replacing One Times Square in order to provide an increased sense of open space and visual focus in the Times Square area,

thereby mitigating to some degree the bulk of the office towers. UDC has determined to accept the staff's recommendation, and the action as approved by UDC includes the substantial alteration or replacement of One Times Square. The further option of

[JA 769]

taking no action at all with respect to One Times Square and permitting the building to remain in its present state has been considered and found to be environmentally acceptable if replacement or substantial alteration proves to be infeasible.

New retail space will be included on virtually all of the 42nd Street blockfaces. In addition, each of the new buildings will contain its own offstreet truck loading bays. Below-grade parking for up to a total of 245 vehicles will be provided under Sites 7 and 12; additional parking (presently intended to be less than 100 spaces) will also be provided under Site 8. (The office developer has indicated it may seek approval for additional parking on sites 3 and 4; if make, such a request will be evaluated in accordance with applicable law and project goals.)

Finally, the Project includes improvements to accommodate increased pedestrian, vehicular and transit traffic and to make access to and use of the subways safer, more convenient and more attractive, including a pedestrian bridge spanning Eighth Avenue between 41st and 42nd Street and linking the mart and the Port Authority Bus Terminal, improvements on the Times Square subway station and a traffic lay-by lane on Eighth Avenue between 40th and 43rd Streets.

Information concerning the proposed design, street-level treatment and lighting of the Project is also set forth in the FEIS.

[JA 784]

*Vehicular Traffic.* Vehicular traffic has been analyzed for both the project Area and a larger traffic impact zone extending to Sixth and Tenth Avenues and 34th through 48th Streets. These

areas have been studied for three peak periods, midday (12:00 noon to 2:00 p.m.), homebound for P.M. Peak (4:00 p.m. to 6:00 p.m.), and pre-theater (7:00 p.m. to 8:00 p.m.), in each case assuming Wednesday (matinee day) conditions. During each of these periods, the completed Project's 1991 traffic volumes (including autos, taxis, buses, limousines, and trucks) were added to those which would be expected in that year without the Project. This "worst case" analysis was carried out assuming no increase in street capacity; no increased enforcement of traffic regulations; no modification of existing traffic signals or other controls; the inclusion of a new (100- or 700-car) garage under the mart (producing a total of either 320 or 920 parking spaces in the project as a whole); and the active use of *all* theater structures for legitimate or institutional purposes.

Using these assumptions, anticipated 1991 traffic volumes were assigned on an unconstrained basis (that is, assuming no diversion of either Project-generated or base traffic or peripheral arteries or other modes) to individual streets throughout the traffic impact area. The resulting volumes for each link have been translated into a volume-to-capacity (V/C) ratio for that link, for each of the peak hour periods studied. As would be expected, V/C ratios for many links exceed 0.90, signifying serious congestion during the peak hours, and, without mitigation, a number of links within the project area and the theater district exceed 1.00, indicating chronic overloads (at least on matinee days) and upstream queues. As indicated above, under the worst-case assumptions outlined above, such queuing could be expected at Eighth Avenue south of 42nd Street, Seventh Avenue north of 42nd Street, 42nd Street itself, several crosstown streets in the theater and garment districts and, under certain circumstances, 40th Street between Broadway and Eighth Avenue.

To counter these impacts, a series of mitigation measures has been incorporated into the project plan. These measures, the impact of which has been quantitatively evaluated in the same manner as the mitigated traffic impacts discussed above, include (a) a new traffic lay-by lane on the east side of Eight Avenue between 40th and 43rd Streets to provide standing and drop-off space for buses and taxis that now block the eastern lane

of Eighth Avenue for this purpose; (b) a relocation of the Port Authority taxi stand on the west side of Eighth Avenue (combined with an appropriate no standing restriction) to facilitate left turns onto westbound 42nd Street; (c) revised and effectively enforced no standing regulations on Seventh Avenue between 41st and 45th Streets (or, alternatively, a partial re-routing of traffic from Seventh Avenue onto Broadway between 45th and 41st Streets); (d) revised signal timing and no-standing regulations on 42nd Street to facilitate through traffic and right turns onto both Eighth Avenue for westbound vehicles and Seventh Avenue for eastbound vehicles; (e) additional enforcement of the foregoing measures by City traffic control agents, for whom space will be provided within the project area; and (f) revised signal timing on 43rd Street to improve crosstown flows. A number of additional mitigation measures (minor signal timing changes, changes in no-standing regulation and the like) are recommended for several adjacent streets in the garment center and theater district.

No. 88-1103

(3)

Supreme Court, U.S.
FILED
FEB 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

STEPHEN F. WILDER, BRENDAN GILL, IMRE J. ROSENTHAL, STEPHEN ROSENTHAL, ROBERT NEUWIRTH, LORI JEAN SAIGH, and the WHITBY TENANTS' ASSOCIATION,

*Petitioners,*

v.

LEE M. THOMAS, as Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; REGION II of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; NEW YORK STATE URBAN DEVELOPMENT CORPORATION; VINCENT TESE, as Chairman of the New York State Urban Development Corporation; TIMES SQUARE REDEVELOPMENT CORPORATION; ROBERT M. HALL, as President of the Times Square Redevelopment Corporation; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; HENRY G. WILLIAMS, as Commissioner of the New York State Department of Environmental Conservation; DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK; HARVEY W. SCHULTZ, as Commissioner of the Department of Environmental Protection of the City of New York; MARIO M. CUOMO, as Governor of the State of New York; and EDWARD I. KOCH, as Mayor of the City of New York,

*Respondents.*

## REPLY BRIEF FOR THE PETITIONERS

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1103

STEPHEN F. WILDER, *et al.*,

*Petitioners,*

v.

LEE M. THOMAS, as Administrator of the United States Environmental Protection Agency, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY BRIEF FOR THE PETITIONERS

All of respondents' arguments for denial of certiorari rest on the same premise – that the New York State Urban Development Corporation ("UDC") found that the 42nd Street Development Project (the "Project") would actually meet the federal 9 ppm standard for carbon monoxide. As discussed below, this premise is flatly inconsistent with the UDC's actual findings that the Project would produce violations of this standard and with the Second Circuit's opinion according collateral estoppel effect to these findings. Thus, respondents provide no grounds whatever for denying certiorari. Quite to the contrary, it is plain

that this case involves a continuing question of major importance not only to private citizens seeking to enforce the provisions of the Clean Air Act, 42 U.S.C. §§ 7410 *et seq.*, but also to the federal Government, in its role as the Act's primary enforcer.

## I. THIS CASE RAISES AN IMPORTANT LEGAL QUESTION OF BROAD SIGNIFICANCE.

Respondents argue that the Second Circuit's decision does not establish any general proposition on whether claims brought in federal court under the Clean Air Act are estopped by state court litigation under a state environmental quality review act like the New York State Environmental Quality Review Act, N.Y. Envtl. Conserv. Law §§ 8-0101 *et seq.* (McKinney 1984 and 1988 Supp.), ("SEQRA"). They maintain that no question of general applicability is presented because the "UDC's utilization of the federal 9 ppm standard for carbon monoxide in this particular case rendered the difference between the two statutory standards of no practical significance." Resp. Br. at 27-28.

Respondents' argument is wholly without merit. It is true, of course, that the carbon monoxide national ambient air quality standard ("NAAQS") of 9 ppm played a role in the state proceedings, but it was very different from the role contemplated by the Clean Air Act. SEQRA requires that "adverse environmental effects" be minimized "consistent with social, economic, and other essential considerations." N.Y. Envtl. Conserv. Law § 8-0109(1)(McKinney 1984) (A-75). Pursuant to SEQRA, the UDC defined "adverse environmental effects" as carbon monoxide concentrations in excess of the 9 ppm standard and then found that the proposed mitigation measures sufficiently minimized such excess concentrations in light of the multitude of non-environmental concerns that are cognizable under Section 8-0109(1)[1]. This approach stands in sharp contrast to the requirement of the Clean Air Act, expressed in the New York State Air

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[1] The Second Circuit is correct that the UDC in the SEQRA process "looked to the NAAQS as 'the standard' that must be attained." *Wilder v. Thomas*, 854 F.2d 605, 619 (2d Cir. 1988) (A-24). But under Section 8-0109(1), the UDC was not required to find, and did not find, that the Project would actually meet this standard.

Quality Implementation Plan (the "SIP"), that mitigation measures "provide for attainment" of the 9 ppm standard. SIP § 3.6(A) (A-82). Under the Clean Air Act, the 9 ppm standard must be met regardless of competing considerations; any excess concentrations lead directly to a violation of the statutory requirement.

Thus, this case cleanly poses the question whether a state court finding, under a state environmental quality review statute like SEQRA, that the amount of pollution in excess of the federal ambient standards has been *minimized* can have collateral estoppel effect in a citizen suit under the Clean Air Act, where the relevant question is whether such excess pollution has been totally *eliminated*.[2]

There can be no doubt that the question is of great national significance. Most large urban metropolitan areas, including New York, Los Angeles, and Houston, are in violation of the NAAQS for carbon monoxide and ozone. *See* 52 Fed. Reg. 45100-02 (1987). In many states, as in New York, the respective state environmental quality review statutes do not require the actual elimination of adverse effects. The California Environmental Quality Act provides, for example, that "in the event specific economic, social, or other conditions make infeasible . . . project elements or . . . mitigation measures, individual projects may be approved in spite of one or more siginficant effects thereof." Cal. Pub. Res. Code § 21002 (West 1986). Thus, the approach of the court below, if left undisturbed, will produce a significant delay in the attainment of the NAAQS, vitiating the central concern of the Clean Air Act. *See Union Electric Co. v. EPA*, 427 U.S. 246, 266 (1976).

Respondents seek to reduce the significance of the question by asserting that "[b]ecause the Second Circuit's holding applies only when state agencies apply the NAAQS in their own environmental review, the decision presents no threat to consistent enforcement of the CAA." Resp. Br. at 31. But because the NAAQS are designed "to protect public health" and "to protect the public welfare from any known or anticipated adverse effects associated with the

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[2] Contrary to respondents' claims, Resp. Br. at 26-27, petitioners do not assert that all Clean Air Act claims are estopped under the Second Circuit's ruling.

presence of . . . air pollutant[s]," 42 U.S.C. § 7409(b), and SEQRA requires the minimization of "adverse environmental effects," it will be rare that state agencies reviewing air quality impacts would identify "adverse environmental effects" without reference to the NAAQS.

In a further effort to obscure the important questions presented in the Petition, respondents provide a thoroughly misleading account of the record. They claim that because the Project would cause "no violation of the 9 ppm standard, the UDC and the City could approve the Project, as planned, without further mitigation (beyond that already incorporated into the Project) and without any conflict between the UDC's SEQRA and SIP responsibilities." Resp. Br. at 28, n. 11. Similarly, they protest that "with [transportation-related] mitigation measures, the *completed* Project would cause no violations of the 9 ppm NAAQS for carbon monoxide." *Id.* at 9 (emphasis added).

But respondents do not mention the UDC's finding, on which the Second Circuit relied, that the 9 ppm standard would be exceeded during the Project's *construction*. *See Wilder v. Thomas*, 854 F.2d 605, 611 (2d Cir. 1988) (A-8); N.Y. State Urban Development Corp., *Findings with Respect to 42nd Street Development Project, New York, New York* at 30 (Oct. 4, 1984) (A-110); Petition at 7. It is undisputed that the Project will lead to violations of the federal 9 ppm standard at least during construction.

Thus, the Petition squarely presents the question whether a state finding that the amount of pollution in excess of the federal ambient standards has been minimized, rather than eliminated, can have collateral estoppel effect in a citizen suit under the Clean Air Act.

Given the UDC's finding that the Project will violate the 9 ppm standard during construction, it is legally irrelevant to the Court's consideration of the issues raised by the Petition whether the Project will also violate the standard after completion. However, respondents' gross mischaracterizations of the record merit a brief answer. First, the Second Circuit directly relied on the UDC's finding that the 9 ppm standard would be violated after completion and explicitly gave collateral estoppel effect to

this finding. *See Wilder v. Thomas*, 854 F.2d at 611 (A-8).[3] Second, the UDC made its findings on October 4, 1984; the UDC's determination was affirmed by the New York Supreme Court and the Appellate Division in 1985. *See Jackson v. New York State Urban Development Corp.*, 110 A.D.2d 304, 494 N.Y.S.2d 700 (1st Dep't 1985). Yet respondents' claim that no violation will occur after the Project's completion is based exclusively on the affidavit of a UDC official, prepared in connection with the federal court litigation on February 6, 1986—more than one year after the UDC's findings. *See* Resp. Br. at 8.[4] In any event, given the undisputed finding of violation during the construction period, the question about the collateral estoppel effect, in a citizen suit under the Clean Air Act, of findings made pursuant to SEQRA is properly presented to the Court regardless of whether the Project will cause subsequent violations as well.[5]

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[3] Respondents' inflammatory statement that the City's Department of Environmental Protection did not find a violation of the 9 ppm standard after the Project's completion is also incorrect. *See* Resp. Br. at 11, n. 6. The City's 1984 "reasonable further progress" report, prepared by the Department, clearly identified such a violation. *See* City of New York, *New York State Reasonable Further Progress in 1984 Toward Attainment of Carbon Monoxide Standards*, at 36-37 (March 1986).

[4] While the New York Court of Appeals affirmed the UDC's finding on May 8, 1986, it did not rely on this affidavit. *See Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400, 503 N.Y.S.2d 298, 494 N.E.2d 429 (1986). Indeed, under established principles of administrative law, it could not have relied on the document because it was not part of the administrative record. Not surprisingly, given the weakness of their claim, respondents rely on various irrelevant materials but never set forth the UDC's actual findings.

[5] In fact, under established collateral estoppel law, the relevant question is not what findings were actually made, but instead, what findings were *necessary* to the decision. *See* Petition at 13. The Second Circuit itself noted, and respondents do not dispute, that a finding of actual compliance with the SIP was not necessary to the UDC's determination under SEQRA. *See Wilder v. Thomas*, 854 F.2d at 618 (A-24). Thus, under no circumstances can the UDC's findings be entitled to collateral estoppel effect in a proceeding under the Clean Air Act.

## II. THE DECISION IN THIS CASE CONFLICTS WITH DECISIONS IN OTHER FEDERAL CIRCUIT COURTS.

The Petition establishes a conflict between the Second and Seventh Circuits, which allow economic and social considerations to be taken into account in enforcement proceedings under the Clean Air Act, and the Third and Sixth Circuits, which do not. *See* Petition at 17-21. Respondents do not contest that the Seventh Circuit is in conflict with the Third and Sixth Circuits. They maintain, however, that this case is not appropriate to resolve the conflict because the "UDC and the City of New York did not seek merely to minimize air quality impacts; nor did they balance social and economic considerations against the value of clean air." Resp. Br. at 32-33. According to respondents, such an inquiry was not necessary because the Project will not produce violations of the 9 ppm standard. *Id.* at 33. Thus, this argument also rests on respondents' baseless assertion, flatly contradicted on the face of the UDC's findings and of the Second Circuit's decision, that the Project will cause no violation of the 9 ppm standard. *See supra* at 4-5.

Moreover, there can be no doubt that, contrary to respondents' contention, the UDC did balance economic and social considerations against the value of clean air, and found that such considerations excused the violations of the 9 ppm standard that it had identified. The UDC expressly found that

> (1) *consistent with the social, economic and other essential considerations*, from among the reasonable alternatives thereto, the action to be approved is one which minimizes or avoids adverse environmental effects to the maximum extent practicable, including the effects disclosed in the Final Environmental Impact Statement; and
>
> (2) *consistent with the social, economic and other essential considerations*, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided by incorporating as conditions

> to the decision those mitigating measures which were identified as practicable.

N.Y. State Urban Development Corp., *Findings with Respect to 42nd Street Development Project, New York, New York* at 43-44 (Oct. 4, 1984) (A-111) (emphasis added). Not surprisingly, the Second Circuit determined that the UDC had "consider[ed] 'social, economic and other factors'," *Wilder v. Thomas*, 854 F.2d at 610 (A-8), and that such an inquiry was required by SEQRA, *see id.* at 618 (A-24).

In giving collateral estoppel effect to these findings, *see id.* at 611 (A-9), the Second Circuit held that the legal issues for the SEQRA and Clean Air Act proceedings were identical. *Id.* at 617-620 (A-21 to A-24). But the legal issues can be identical only if in enforcement proceedings under the Clean Air Act, as under SEQRA, social and economic considerations are cognizable, and can excuse compliance with the requirements of the SIP.[6] Thus, the Second Circuit, like the Seventh Circuit, is at odds with the Third and Sixth Circuits, and this case provides an appropriate vehicle to resolve the conflict.

## III. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS AND POLICIES OF THIS COURT.

Respondents maintain that the decision below will not encourage litigants to bypass state court remedies. In support of this argument, they seek to limit the scope of the Second Circuit's decision to cases in which the environmental impact statement does not reveal violations of the NAAQS. According to respondents, "the opinion suggests that when a state EIS prepared pursuant to SEQRA reveals a violation of the NAAQS, litigants will have available both SEQRA and CAA actions." Resp. Br. at

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[6] Respondents further maintain that the question of "whether economic or technological considerations are cognizable in CAA enforcement proceedings . . . was simply not . . . briefed or argued by any party." Resp. Br. at 34. This claim, like most of the other factual assertions in respondents' brief, is completely false. Petitioners argued to the Second Circuit that while SEQRA permits a balancing of social and economic considerations, the Clean Air Act does not, particularly in light of *Union Electric Co. v. EPA*, 427 U.S. 246 (1976). *See* Appellants' Reply Brief at 15, *Wilder v. Thomas*, 854 F.2d 605 (2d Cir. 1988).

41. Once again, respondents' argument relies wholly on the false proposition that the record reveals no violation of the 9 ppm standard. *See supra* at 4-5, 6.

Respondents also maintain that there is no incentive for a bypass of state remedies because, even if petitioners' claims under the Clean Air Act were allowed, petitioners would be entitled only to a record review of the UDC's findings and would not be entitled to an evidentiary hearing.[7] The record in this case belies respondents' claim. Petitioners sought to challenge not only the adequacy of the mitigation measures that were approved by the UDC, but also subsequent efforts by the City of New York to assure the implementation of such mitigation. *See* Petition at 16. Respondents do not argue, as indeed they cannot, that the failure to carry out mitigation measures is not enforceable under the citizen suit provisions of the Clean Air Act. Yet, it is clear that the only way in which allegations of such failures can be tested is by means of an evidentiary hearing in the district court as there is no administrative record for the court to review nor any administrative agency empowered to make such a record.[8]

Thus, at the very least, the effect of the Second Circuit's decision is that a challenge in state court to the adequacy of mitigation measures, will estop litigants from challenging in federal court the wholly separate question of whether such mitigation measures are being properly implemented. This reason alone provides a strong incentive to bypass state court remedies.

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[7] Even if there were no right to an evidentiary hearing in federal court, ligitants would choose to bypass state court remedies because the Clean Air Act mandates actual compliance with SIP requirements, while SEQRA does not. *See supra* at 2-3.

[8] Finally, respondents do not meet petitioners' arguments that an administrative determination affirmed by a state court is not entitled to collateral estoppel effect if there was no opportunity, in the administrative proceedings, to rebut evidence presented to the agency. *See* Petition at 15-16. Respondents' argument that the availability of such an opportunity is irrelevant to the collateral estoppel question, *See* Resp. Br. at 36-37, is an attempt to rewrite *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), to suit respondents' litigation needs.

## IV. THE DECISION BELOW WILL HAMPER EPA'S ENFORCEMENT OF THE CLEAN AIR ACT.

The decision below will hamper EPA in its role as the Clean Air Act's primary enforcer. Clean Air Act contemplates a dual mechanism for enforcement. Section 113, 42 U.S.C. § 7413, sets forth the procedures for federal enforcement by EPA of any SIP requirement. In turn, section 304, 42 U.S.C. § 7604, provides private enforcement by means of citizen suits of certain SIP requirements. For both types of actions, the definition of an actionable "violation" is identical, since it is provided by the SIP itself. *Compare* 42 U.S.C. § 7413(a)(1) *with* 42 U.S.C. § 7604(a)(1), (f)(3).

While the Petition in this case arises out of a citizen suit, the Second Circuit's decision interprets the Clean Air Act in a manner that will also affect the federal enforcement provision. As indicated above, a necessary predicate to the Second Circuit's ruling was its determination that the SIP requirement that mitigation measures "provide for attainment of the [9 ppm standard]," SIP § 3.6 (A-82), is not violated if pollution concentrations in excess of 9 ppm are minimized consistent with social and economic considerations. *See supra* at 2, n5. Thus, under the decision below, EPA will not be able to insist on actual compliance by indirect sources with the requirements of the SIP.[9] This effect on federal enforcement of the Clean Air Act greatly magnifies the extent to which the Second Circuit's decision will delay attainment of the NAAQS. *See supra* at 3.

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[9] Of course, if the Court has doubts about the impact of the decision below on EPA, it can invite the Solicitor General to file a brief expressing the views of the United States.

## CONCLUSION

For the foregoing reasons, and for those presented in the Petition, the Court should issue a writ of certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

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Dated: February 7, 1989